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IN THE SUPREME COURT OF MISSOURI

No. SC95658

BISHOP & ASSOCIATES, LLC,

Appellant,

v.

AMEREN CORPORATION,
UNION ELECTRIC COMPANY d/b/a AMEREN MISSOURI,
AMEREN SERVICES COMPANY, JAMES ARMISTEAD,
MICHAEL WRIGHT AND RICHARD GEORGE,

Respondents.

SUBSTITUTE BRIEF OF RESPONDENTS

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Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

TABLE OF CONTENTS

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

TABLE OF AUTHORITIES

Cases **Page(s)**

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Statutes, Regulations and Rules

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Other Authorities

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

INTRODUCTION

Appellant Bishop & Associates, LLC ("B&A"), a commercial plumbing contractor, filed this lawsuit against Respondents Ameren Corporation, certain of its subsidiaries and three Ameren supervisory employees, claiming that Ameren terminated its use of B&A in violation of public policy and that the employees defamed B&A and tortiously interfered with its business relationship with Ameren. B&A contends Ameren stopped using its services because it reported to Ameren what B&A alleges were violations of environmental laws and municipal ordinances found in the course of its plumbing work. Amended Petition, ¶1 (LF000128). After B&A was informed Ameren would no longer use its services, B&A reported these alleged violations to the U.S. Environmental Protection Agency ("EPA"), the Missouri Department of Natural Resources ("MDNR"), the Metropolitan St. Louis Sewer District ("MSD") and St. Louis County Plumbing Office. None of these agencies found a violation based on B&A's allegations.

B&A concedes it was never an employee of Ameren. At all times it was an independent contractor. It provided plumbing services on an as-needed basis pursuant to a purchase order that only specified the rates to be charged if and when B&A's services were used. Ameren had no contractual obligation to use B&A on any particular jobs. On July 29, 2010, Ameren notified B&A that it would not be using B&A's services on future plumbing jobs. The notice was provided after B&A took issue with a directive to notify Ameren before showing up at Ameren's facilities to do periodic, non-emergency maintenance.

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

B&A's Amended Petition alleges in Count I wrongful discharge in violation of public policy and in Count II breach of the implied covenant of good faith and fair dealing. In both counts B&A claims that Ameren stopped using its services because B&A reported to Ameren's "high level officials" "serious misconduct" that constituted violations of law. Amended Petition, ¶¶37, 56 (LF000136, LF000141-42). B&A also alleges the individual Ameren supervisors tortiously interfered with B&A's business relationship with Ameren (Count III) and defamed B&A by expressing concerns within Ameren about B&A's cost (Count IV).

The circuit court, Judge Joan Moriarty, properly granted summary judgment on all counts. In a well-reasoned and carefully researched 30-page opinion, the court held that independent contractors do not have a cause of action for wrongful discharge in violation of public policy in Missouri. Appendix ("Appx") A15-44. That cause of action requires an employer/employee relationship. This is true whether the claim is a tort or contract action. The circuit court found a wrongful discharge claim on behalf of an independent contractor is not just unprecedented in Missouri, "but unprecedented *anywhere* in this country." Appx-A35 (emphasis in original).

As for the tortious interference claim against the individual employees, the court concluded that an action for tortious interference with a business expectancy will only lie against a third party. Appx-A19. The employees were agents of Ameren and therefore not third parties to any relationship between B&A and Ameren. *Id.* The court also found there was no competent evidence that this case fell within any exception to this third party rule. Appx-A20-21. Specifically, there was no evidence that any of the individual

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

respondents interfered with B&A's relationship with Ameren through "improper means" and for his own financial gain and self-interest. *Id.* The court granted summary judgment on the defamation count because the alleged communications fell within the intra-corporate immunity doctrine. Appx-A18-19. B&A does not appeal summary judgment on the defamation count.

The Missouri Court of Appeals for the Eastern District (Clayton, P.J., Mooney, J., James Dowd, J.) unanimously affirmed the grant of summary judgment for the same reasons stated in the circuit court's opinion. The court of appeals also affirmed for the independent reason that B&A was not a whistleblower. "Whistleblowing" requires reports of wrongdoing or violations of law to "superiors or public authorities." Since B&A is an independent contractor, a report to employees and officers of Ameren is not a report to "superiors," and B&A did not report any alleged violations to public authorities before the alleged discharge.

Due to B&A's failure to satisfy the requirement of an employer/employee relationship, the circuit court and the court of appeals did not reach the question whether B&A presented competent evidence that it reported "serious misconduct that constitutes a violation of the law and of . . . *well-established and clearly mandated public policy*." *Margiotta v. Christian Hospital Northeast Northwest*, 315 S.W.3d 342, 347 (Mo. banc 2010) (emphasis in original; internal citation omitted). In fact, B&A failed to present evidence creating a genuine issue of fact on this element of a wrongful discharge claim. B&A's "reports" involved routine plumbing and maintenance issues that Ameren hired B&A to address, which hardly evinces any "misconduct" on the part of Ameren. None of

B&A's reports identified any specific law, code or ordinance provision that was violated by a condition on Ameren's property. Nor is there evidence that any hazardous substance ever left Ameren's property, let alone in a manner that violated environmental laws. It is therefore not surprising that no state or federal agency found a violation of law associated with B&A's allegations.

STATEMENT OF FACTS

Pursuant to Rule 84.04, respondents submit their own statement of facts, because the "facts" in B&A's brief are primarily derived from the deposition or correspondence of Robert Bishop. Many of his statements are merely self-serving conclusions or speculation, constituting neither competent nor admissible evidence on the issues relevant to this appeal. Accordingly, respondents set forth their own statement of facts supported by citation to: (1) material facts admitted by B&A in its summary judgment response; (2) the allegations in the Amended Petition; (3) admissions by Robert Bishop; (4) uncontested deposition testimony; and (5) the documentary record.

A. The Parties

Appellant B&A is an independent commercial plumbing contractor operated by Robert Bishop and owned by his wife, Kara Bishop. Amended Petition, ¶1 (LF000128); Deposition of Robert Bishop ("Bishop Dep.") (5/14) 24-29 (LF001043-44). Robert Bishop is an employee of B&A. Plaintiff's Responses to Uncontroverted Facts ("Facts"), ¶2 (LF000687). He has never been an employee of Ameren. Facts, ¶4 (LF000688). The corporate respondents are Ameren Corporation and two of its subsidiaries, Union Electric Company and Ameren Services Company (collectively, "Ameren"). Facts, ¶3

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

(LF000688). The individual respondents are James Armistead, Michael Wright and Richard George, who were Ameren building maintenance supervisors responsible for managing their department's relationship with outside contractors like B&A. Facts, ¶¶5-7 (LF000688).

B. B&A's Relationship with Ameren

In late 2002, Ameren Services Company issued a purchase order for B&A to provide "emergency service and/or preventative maintenance on an as-needed basis, at Ameren/UE Building Service locations." Facts, ¶¶8-10 (LF000689); Ex. D-4 (LF000425-29). The purchase order was by its express terms non-exclusive and guaranteed no minimum quantity of work. *Id.* Ameren was not obligated to use B&A on any particular jobs. *Id.* Robert Bishop understood that Ameren was free to use other plumbing companies and could stop using B&A's services at any time. *Id.* At no time was B&A the only plumbing contractor used by Ameren and B&A was free to work for other customers. Ex. Bishop 2 (LF000759); Bishop Dep. (5/14) 113-18 (LF001065-67). Under the purchase order, B&A would perform plumbing tasks and clean oil/water separators and other drainage facilities at certain Ameren properties. Facts, ¶11 (LF000689). B&A would separately invoice each job, charging for man hours, materials

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

and equipment. It was B&A's practice to routinely prepare photo reports regarding the services provided. Bishop Dep. (5/14) 92 (LF001060).[1]

During the time that B&A was providing services to Ameren, B&A regularly employed two full-time and two part-time employees. Amended Petition, ¶4(a) (LF000128). Bishop testified that he reached a point where he had to decide whether to hire additional employees to service Ameren and B&A's other customers. Bishop Dep. (5/14) 113-16 (LF001065-66); Bishop Dep. (11/14) 198 (LF001217). Bishop testified that, rather than expand the company, B&A chose to drop other customers that were "slow pay" or had disputed B&A's invoices. *Id.* As Bishop testified, "Ameren was bending over backwards to try to get me paid and help me to be paid timely." Bishop Dep. (5/14) 114 (LF001066).

B&A also did some routine cleaning of separators and drainage piping at certain Ameren facilities during slow times in B&A's schedule, an arrangement Bishop called "flex-time." Bishop Dep. (5/14) 109-12 (LF001064-65). B&A understood that Ameren had the right to terminate the flex-time arrangement. Bishop Dep. (5/14) 311 (LF001117). For many years Bishop expressed appreciation for B&A's relationship with Ameren. He acknowledged that through December 2008 he believed that the people at

[1] Appellant erroneously suggests that these reports were only prepared to document and report "problems and conditions" B&A "considered a threat to life, health and safety." B&A Substitute Brief 7.

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Ameren were attempting to do things the right way. Bishop Dep. (5/14) 144-47 (LF001073-74).

C. B&A's Unsuccessful Attempts to Obtain a Guaranteed Contract

In February 2009, in the throes of the recession, Mike Wright wrote B&A that "due to the current economic conditions please do not perform any of the 'yearly flextime maintenance' at any UE regional location without first getting the OK [from] me." Ex. D-17 (LF000447). Wright wrote that he would consider the merits of performing this work on a case-by-case basis. Bishop testified that he "was worried about any reduction in work." Bishop Dep. (5/14) 160 (LF001078). Ameren supervisors told him that due to the economy, there was pressure to bid out work on non-emergency services. Ex. D-18 (LF000452).

In January 2010, in an effort to avoid having to bid for Ameren plumbing work, B&A made a proposal to Ameren for an exclusive contract whereby B&A would provide plumbing services for a three-year period with a 2-man crew at a minimum "fixed cost" of $720,000 per year—more than Ameren had paid B&A in any prior year. Ex. D-25 (LF000906-09); Bishop Dep. (5/14) 234-37 (LF001097).[2] Ameren would also be required to provide B&A with a building for its office and to store its equipment. *Id.* B&A included with its proposal a PowerPoint with photos. Ex. D-26 (LF000910-25).

[2] B&A wrongly asserts that the $720,000 per year figure "came at the suggestion of" Ameren manager Scott Held. B&A Substitute Brief 12. This statement is wholly unsupported by the record, including the citations relied on by B&A.

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

The PowerPoint described the photos as depicting "improper" plumbing installations B&A had corrected over the past seven years and other situations it had addressed "prior to becoming incidents." LF000913, LF000919-21. B&A attributed the improper installations to unnamed Ameren personnel "who have no plumbing license." LF000912.

Ameren did not accept B&A's proposal, which would have exempted B&A from bidding and guaranteed it income regardless of Ameren's needs. Defendants' Response to Material Facts, ¶63 (LF001625); Ex. D-25 (LF000907). Bishop testified in his deposition that he believed Ameren's rejection of the fixed price proposal was retaliation against B&A. Bishop Dep. (5/14) 346 (LF001126). At the time, however, Bishop acknowledged that the economy was the driving factor behind Ameren's emphasis on competitive bidding. As Bishop wrote to an Ameren supervisor shortly after learning the proposal had been rejected:

> I unfortunately put all my eggs in the Ameren basket to address the work demand by cutting the other accounts. It was great for a couple of years. Unfortunately, with the cutbacks/budget/economy, with Ameren's reductions for us, I'm in real trouble now.

Ex. D-29 (LF000455).

After rejection of B&A's contract proposal, Bishop requested a meeting with James Armistead, Director of Building Services, in order to discuss the proposal. Ex. D-33 (LF000458-59). In conjunction with a meeting that occurred on May 18, 2010, Bishop provided Armistead with a letter that referenced B&A's decision years earlier to reduce its clientele to focus on Ameren. Ex. D-35 (LF000462-63). The letter

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

acknowledged that "no one anticipated, nor expected the economic down turn of two years ago. Budgets have obviously changed as a result, creating new challenges for everyone involved." LF000462.

In the letter Bishop expressed the opinion that reducing B&A's services "creates environmental issues & safety liabilities for Ameren" and that due to its "thorough approach" B&A was being labeled as "expensive/extravagant." *Id.* The letter stated: "Our company cannot compete with contractors or 'handymen' that don't perform the work in accordance with ordinance, nor can we compete with people that are not thorough and protective/caring of Ameren as we are." LF000463. In his deposition, Bishop could not identify a single competitor that he believed competently bid plumbing projects. Bishop Dep. (5/14) 357 (LF001128).

As with the fixed price proposal, Bishop attached to his letter photo reports of jobs B&A had done for Ameren in the past. Ex. D-35 (LF000464-74). Again Bishop claimed the photos depicted "improper" installations by unidentified "in-house personnel" that had been corrected by B&A. LF000465. Bishop testified that B&A was trying to show Armistead "that by using people who are licensed and do the work right, this type of expense is avoided and it's done right the first time." Bishop Dep. (5/14) 399-400 (LF001140).[3]

[3] Ironically, some of the photo reports involved plumbing work Bishop did on behalf of B&A at Ameren sites in Illinois. During his deposition Bishop admitted he is not licensed to do plumbing work in Illinois. Bishop Dep. (11/14) 96-97 (LF001190).

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

B&A also included photos taken a few days before the May 18 meeting of an oil tank retention area at Ameren's Dorsett facility. Bishop Dep. (5/14) 359-64 (LF001129-30). This area had not been mentioned in any of B&A's prior submissions to Ameren.[4] B&A asserted that these photos showed "improper applications and piping installations resulting in the complete breaching of the chemical containment area by in-house personnel design/install of the drainage piping system," which resulted in a small pool of oily liquid appearing in an adjoining rock trench on Ameren's property. Ex. D-35 (LF000465); Video Exs. P-35, P-36 (LF001660-61). Bishop admitted during his deposition he did not know the permissible procedure for discharging liquid from the retention area. Bishop Dep. (11/14) 47 (LF001178). In its May 18 submission, B&A did not identify any law that was violated by the small pool of oily liquid on Ameren's property and Bishop conceded during his deposition he had no information any oil ever migrated off Ameren's property. Bishop Dep. (11/14) 149-50 (LF001203-04). Bishop reported his concerns about the Dorsett tank farm to the EPA, MDNR and MSD immediately after Ameren stopped using B&A. Inspections of the tank farm were conducted by MDNR and MSD and no violations were found.

Bishop taped his May 18 conversation with James Armistead without Armistead's knowledge. Bishop Dep. (5/14) 339-41 (LF001124). Although the recording was

[4] B&A erroneously claims that it "documented the inadequacy of a chemical containment system at the Dorsett facility" in its January 2010 fixed price proposal. B&A Substitute Brief 12. *See generally* Ex. D-26 (LF000910-25).

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

produced in discovery, B&A did not submit or rely on any part of the recording to support its characterization of the conversation in its opposition to summary judgment. Instead, B&A relied on Bishop's recollection of what was discussed. Even that recollection does not support the assertion on page 15 of B&A's Substitute Brief that Armistead told Bishop to "stop reporting" his concerns.[5] Bishop did recall that during the conversation Armistead asked why B&A was not bidding on certain Ameren plumbing jobs. Bishop Dep. (5/14) 351-52 (LF001127). In his deposition, Bishop admitted B&A had not bid on certain projects for reasons "that had nothing to do with Ameren." *Id.*

On May 23, 2010, Bishop contacted Michael Menne, Ameren's Vice President of Environmental Safety and Health, to discuss the possibility of B&A obtaining work from Ameren's environmental department. Facts, ¶¶26-27 (LF000700). Bishop asked for an appointment to discuss a "concept [he] believe[d] would extensively benefit Ameren" and would "assist in identification, cataloguing & assessment of environmental issues [B&A had] come to identify over the years in dealing/assisting Ameren in protection of its assets/properties/health/safety programs." *Id.*

In early June 2010, Bishop met with Menne, as well as Warren Mueller and John Pozzo, two other Ameren environmental managers. Facts, ¶¶28-30 (LF000700-01). At

[5] Bishop merely recalled Armistead saying that B&A needed to leave it to Ameren managers to decide whether to address any plumbing issues raised by B&A. Bishop Dep. (5/14) 342 (LF001125).

the meeting—which Bishop again surreptitiously recorded—Bishop provided a copy of his May 2010 letter to Armistead, including the photo reports. *Id.*; Bishop Dep. (5/14) 438 (LF001150); Ex. Ameren-G (LF000337-50). Bishop subsequently sent additional photo reports to Mueller. Like those included with the May 2010 letter, these reports involved work B&A had been asked to perform at Ameren facilities in years past and did not identify any statutes, regulations or municipal code provisions that conditions on Ameren's properties allegedly violated. *See* Exs. Ameren-F (LF000286-336); Ameren-H (LF000351-73); Ameren-I (LF000374-403); Ameren-J (LF000404-21). Rather, the reports repeatedly state that B&A addressed the issues identified, thus averting environmental issues and contamination of public sewer systems.[6]

[6] *See, e.g.*, Ex. Ameren-F (LF000305 (in April 2009, B&A "inspected, cleaned and hydroflushed" the Ameren storm sewer at Belleville facility and "verified the sewer was clear & flowing," which "avoid[ed] any EPA issues"), LF000308 (B&A cleared Ameren sewer lines at Belleville facility in March 2010, thus eliminating all sludge and by-products and "removing liability from Ameren")); Ex. Ameren-H (LF000360) (in October 2009, by-products in the Ameren sanitary main at Belleville facility were "flushed/recovered to prevent passing onto the City Sewer system"); Ex. Ameren-J (LF000418 (B&A performed maintenance work at Dorsett facility in March 2009 to remove oil and sludge from motor trans wash bay separator, which "protect[ed] Ameren from MSD/EPA violations" and preserved the "actual piping infrastructure"), LF000420

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Bishop testified that Menne, Pozzo and Mueller were professional and listened to him "fairly and intently." Bishop Dep. (5/14) 442-43 (LF001151). He "thought that they were sincere and weren't pushing me off, and I felt that they would do the due diligence to check into things." Bishop Dep. (5/14) 447-49 (LF001152). After the meeting he sent an email to Menne and Mueller proposing that the Ameren environmental department hire B&A for a 3 to 5 year "program of services." *Id.*

D. Ameren's Decision Not to Use B&A on Future Plumbing Jobs

Ameren continued to use B&A as a plumbing contractor after Bishop's meetings with Ameren management in May and June of 2010. Facts, ¶35 (LF000703). However, on July 13, 2010, B&A showed up at Ameren's Alton, Illinois facility to perform non-emergency maintenance without notifying Ameren in advance. Facts, ¶¶36-37 (LF000703). The supervisor at the site told Bishop that he had not requested the service and did not want B&A to provide maintenance services that day. Bishop Dep. (5/14) 451-54 (LF001153-54).

Upon being turned away, Bishop sent an email to Menne and Mueller stating "[i]f Ameren doesn't intend to use our services any longer, I'd like to know it up front." *Id.*; Ex. D-41 (LF000480). Menne forwarded the e-mail to Armistead. Ex. Bishop 9 (LF000779-80). Armistead advised Menne that he had spoken to the supervisor at Alton and that Bishop "has been told in the past to call us before scheduling any service." *Id.*

(B&A removed oil from sanitary piping at Dorsett facility in March 2009, in order to "prevent liability issues for Ameren with MSD/EPA")).

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Armistead explained that Ameren was "getting bids from two other companies to do this routine work at Alton," and that if B&A "is the low bid we will continue to use [it] however [B&A] will have to call first to schedule maintenance." *Id.*

Armistead forwarded copies of these e-mails to supervisors Wright and Wiesehan. Mike Wright then sent Bishop an email on July 14 stating:

> As a reminder please contact the appropriate Building Services management personnel, at least several days in advance, before arriving to perform flex time maintenance. This allows us the opportunity to ensure there are no conflicts with the operating groups at the location and enables us to be on site, while you are working, if we deem it necessary.

Ex. D-42 (LF000484-85).

Rather than agreeing B&A would do so in the future, Bishop responded that day with a six-paragraph, single-spaced e-mail to nine Ameren managers and supervisors. Ex. D-42 (LF000482-83). Bishop stated that Wright's email was not a "reminder," but rather "a procedural change on Ameren's part which I was not contacted about nor consulted." *Id.* He claimed that "in 5 yrs I haven't been addressed with such during flex services." *Id.* Bishop made this statement despite Mike Wright's February 2009 email in which Wright stated B&A should obtain approval before performing routine maintenance, an instruction Bishop acknowledged at the time. Ex. D-17 (LF000444, LF000447). In his July 14 email, Bishop maintained that having B&A's services "prearranged/preapproved" negated the purpose of "flex work scheduling" for B&A. Ex. D-42 (LF000482). Bishop described B&A's position during his deposition.

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Q. And so your position is even calling as you're heading over interfered with the arrangement?

A. It wasn't whether it interfered or not, it was not a requirement of it. It wasn't expected.

Q. Well presumably your objection was because you thought it interfered with the flextime arrangement, why would you care otherwise?

A. Why would I care?

Q. Yes.

A. Because I want the ability to go do the work that I've already been authorized to do.

Bishop Dep. (5/14) 468-69 (LF001157).

On July 29, 2010, following Bishop's objection to the request that B&A call ahead before performing maintenance, Ameren notified Bishop that it would not be using B&A on future plumbing jobs. Facts, ¶44 (LF000706). After its decision regarding B&A, Ameren continued to use at least seven other plumbing contractors to perform work at the facilities that had been serviced by B&A. Ex. Bishop 2 (LF000759). Ameren's plumbing costs decreased significantly. *Id.*

E. B&A Reports Not Corroborated by Regulatory Agencies

Within days after receiving notice that Ameren would no longer be using B&A's services, B&A and its counsel began contacting the EPA, MDNR, MSD, and St. Louis County plumbing officials. Facts, ¶¶45-69 (LF000707-12). Beginning in August 2010, Bishop provided these agencies with B&A's photo reports on Ameren's facilities. *Id.* He

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

scheduled in-person meetings to discuss the purported issues B&A found at Ameren and repeatedly e-mailed the agencies to inquire about the status of their investigations. *Id*. Bishop focused the bulk of his reporting to these agencies on the oil tank retention area at the Dorsett facility, which Bishop had first raised with Ameren in May 2010. *Id.* He alleged that the tank area was improperly designed and illegally discharging oil to the ground adjacent to the containment area. Facts, ¶22 (LF000698-99); Ex. D-35 (LF000464-69).

In response to Bishop's communications, MDNR and MSD conducted inspections of the Dorsett facility in September and November of 2010. Facts, ¶¶53-67 (LF000708-11). MDNR did not find any evidence of improper design or water pollution, and did not issue any violation related to the oil tank retention area.[7] Bishop then contacted MSD to say he had an "issue" with MDNR's findings, complaining that MDNR was "ignor[ing] the regulations." Ex. D-92 (LF000566); Ex. D-93 (LF000568). MSD then conducted its own investigation of the Dorsett facility. Facts, ¶¶64-67 (LF000711). Not only was MSD unable to find any evidence to support B&A's complaints, but it also concluded

[7] The MDNR investigative report concludes, "[n]o introduction of waste material to stormwater or sanitary sewer infrastructure observed" and "[n]o contaminants observed leaving property via water/stormwater discharge." Ex. D-89 (LF000546). In the course of its inspection elsewhere on the property, MDNR did identify violations of container labeling regulations that it directed Ameren to correct. These violations were not the subject of B&A's reports. Facts, ¶¶57-58 (LF000709-10).

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

that "much seemed to be contradicted." Ex. D-98 (LF000570-71); Deposition of Alverda Opperman 91-92 (LF001343). After reviewing the information B&A provided, and after these inspections of the Dorsett facility, no federal, state or local agency cited Ameren for any violation of an environmental, plumbing or other law based on B&A's reports. Facts, ¶¶45-69 (LF000707-12).

ARGUMENT

I. THERE IS NO SUPPORT IN LAW OR PUBLIC POLICY FOR THE EXPANSION OF THE WRONGFUL DISCHARGE CAUSE OF ACTION TO INDEPENDENT CONTRACTORS (Responding to Point #1)

A. Standard of Review

Summary judgment should be granted if the pleadings, depositions, and admissions on file, together with any affidavits, reveal that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp*., 854 S.W.2d 371, 381 (Mo. banc 1993). A defendant may establish a right to summary judgment by showing that the non-movant has not been able to produce evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's elements. *Id*. Review on appeal from a grant of summary judgment "is essentially de novo." *Id.* at 376.

A party seeking to avoid summary judgment must present ***competent*** and ***admissible*** evidence that creates a genuine issue of material fact. *State ex rel. Wegge v. Schrameyer*, 448 S.W.3d 301, 303 (Mo.App.E.D. 2014); *Syngenta Crop Protection, Inc. v. Outdoor Equipment Co.*, 241 S.W.3d 425, 428 (Mo.App.E.D. 2007) ("Affidavits in

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

opposition to motions for summary judgment must be made on personal knowledge, set forth facts as would be admissible in evidence, and show that the affiant is competent to testify."). Accordingly, "[p]arties may not avoid summary judgment by introducing their own statements of conclusory allegations in order to create a genuine issue of material fact." *Garrett v. Impac Hotels 1, L.L.C.*, 87 S.W.3d 870, 872 (Mo.App.E.D. 2002).

B. B&A's Wrongful Discharge Claim Fails Because an Employer/Employee Relationship is a Required Element of a Wrongful Discharge Claim

Missouri courts traditionally held under the "employment-at-will doctrine" that an at-will employee could be terminated for any reason or for no reason. *Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661, 662-63 (Mo. banc 1988). On February 9, 2010, this Court in *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81, 92 (Mo. banc 2010), recognized a "narrow" exception to the employment-at-will doctrine when an ***employee*** is terminated for reporting a violation of the law and well-established and clearly mandated public policy. In two cases decided the same day as *Fleshner*, this Court reiterated that a wrongful discharge claim must be predicated on a direct employment relationship. *Margiotta*, 315 S.W.3d at 346 ("very narrowly drawn" public policy exception provides that "[a]n at-will employee may not be terminated for refusing to perform an illegal act or reporting wrongdoing"); *Keveney v. Missouri Military Academy*, 304 S.W.3d 98, 103 (Mo. banc 2010) (cause of action may be pursued by employee with written employment contract).

There is no claim that B&A, a limited liability company, was ever an employee of Ameren. Indeed, there is no dispute that B&A was at all times an independent contractor

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and Bishop its employee. Facts, ¶¶1-2 (LF000687). B&A is asking this Court to extend the public policy wrongful discharge doctrine to the decision by an owner not to use an independent contractor or to terminate its relationship with that contractor. The circuit court carefully analyzed not only Missouri precedents but similar cases throughout the country. It identified "fundamental reasons" why the wrongful discharge claim asserted in Count I of B&A's Amended Petition was not available to independent contractors. *See* Appx-A27. Those reasons warrant a decision of this Court affirming the circuit court's grant of summary judgment.

1. This Court Has Unequivocally Held That an Employer/Employee Relationship is a Required Element of a Wrongful Discharge Claim

The first reason the circuit court cited in support of summary judgment is that this Court has "*unequivocally* stated and held that 'a wrongful discharge cause of action requires an employer-employee relationship.'" Appx-A28 (emphasis in original) (quoting *Farrow v. Saint Francis Med. Center*, 407 S.W.3d 579, 595 (Mo. banc 2013)). The employer/employee relationship has been an essential element in all of this Court's wrongful discharge cases.

In *Farrow*, this Court held that a nurse terminated by the hospital which employed her did not have a wrongful discharge claim against a doctor who was her supervisor at the hospital. The Court stated:

> "[A] wrongful discharge cause of action **requires an employer/employee relationship**." *Brooks v. City of Sugar Creek*, 340 S.W.3d 201, 213 (Mo. App. W.D. 2011). Doctor acted only in a supervisory manner with respect

to Farrow's work duties. Hospital was her employer, not Doctor. Therefore, since Farrow cannot establish an employer-employee relationship existed between her and Doctor as a matter of law, the circuit properly entered summary judgment in Doctor's favor on Count V. *Chandler v. Allen*, 108 S.W.3d 756, 764 (Mo.App.W.D. 2003).

Farrow, 407 S.W.3d at 595 (emphasis added).

B&A argues here, as it did unsuccessfully in both courts below, that this language in *Farrow* is mere *dicta*. As the circuit court observed, "This argument is unconvincing, to say the least." Appx-A29. The requirement of an employer/employee relationship was essential to this Court's conclusion in *Farrow*. B&A's work for Ameren as an independent contractor does not meet *Farrow*'s requirement of an employer/employee relationship. As the circuit court explained, "[i]t is black-letter law in Missouri" that a relationship "between an independent contractor and contractee is not the same thing at all as an employer/employee relationship." Appx-A30. Therefore, the circuit court properly concluded that B&A's wrongful discharge claim failed as a matter of law.

2. Even Before *Farrow*, There Was No Support in Missouri Law for Expansion of the Wrongful Discharge Cause of Action to Independent Contractors

The employer/employee limitation on a wrongful discharge cause of action was recognized in Missouri long before *Farrow*. The circuit court cited this history as the second reason for granting summary judgment to Ameren on B&A's wrongful discharge claim. In the three wrongful discharge cases decided on February 9, 2010, this Court

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

repeatedly emphasized the centrality of the employment relationship. The decisions in *Fleshner*, *Keveney*, and *Margiotta* are all couched solely in terms of "employer" and "employee."[8]

Both before and after these decisions, Missouri courts have repeatedly rejected public policy wrongful discharge claims where the plaintiff and defendant did not have an employer/employee relationship. *Farrow* cited both *Brooks v. City of Sugar Creek*, 340 S.W.3d 201 (Mo.App.W.D. 2011) and *Chandler v. Allen*, 108 S.W.3d 756 (Mo.App.W.D. 2003). As the court of appeals observed in *Brooks*, "'Missouri law allows a former employee to maintain a public-policy wrongful discharge cause of action **only** against a former employer.'" 340 S.W.3d at 213 (emphasis added) (quoting *Taylor v. St. Louis County Board of Election Comm'rs*, 625 F.3d 1025, 1027 (8th Cir. 2010)). *See Chandler*, 108 S.W.3d at 764 (summary judgment proper on wrongful discharge claim where plaintiff could not establish employer/employee relationship).[9]

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[8] B&A argues that *Keveney* held that "under the law of this State, all ***workers*** should be on the 'same footing' as all can be equally subject to coercive economic pressures." B&A Substitute Brief 32 (emphasis added). *Keveney* actually stated its holding "place[d] at-will and contract ***employees*** on the same footing." 304 S.W.3d at 103 (emphasis added).

[9] Contrary to B&A's assertion that summary judgment is inappropriate in cases such as this, *see* B&A Substitute Brief 30, *Farrow*, *Brooks* and *Chandler* illustrate that dispositive motions are routinely granted when a wrongful discharge cause of action

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No Missouri appellate court has ever recognized a claim by an independent contractor for wrongful discharge in violation of public policy. Appx-A31. The only state or federal court to squarely address the issue under Missouri law rejected the cause of action on the grounds that there was no employer/employee relationship. *Princess House, Inc. v. Lindsey*, 918 F.Supp. 1356, 1373 (W.D.Mo. 1994), *aff'd*, 77 F.3d 486 (8th Cir. 1996). Nevertheless, B&A argues that "[a]dditional support can be found from within the Missouri courts for extending the wrongful discharge cause of action to independent contractors." B&A Substitute Brief 38. Yet it cites only one case, *Bishop v. Shelter Mutual Insurance Co.*, 129 S.W.3d 500 (Mo.App.S.D. 2004), and the circuit court demonstrated why *Shelter Mutual* does not support this proposition. Appx-A32-34.

Shelter Mutual involved various claims by an individual insurance agent against the insurer for which he worked. The insurance agent did not appeal the circuit court's grant of summary judgment against him on his claim for wrongful discharge, so that issue was not before the court of appeals. *Shelter Mut.*, 129 S.W.3d at 502 & n.1. Moreover, Shelter did not dispute on appeal that the plaintiff should be treated as Shelter's employee for purposes of the lawsuit. *Id*. at 506. Therefore, the court of appeals never reached the question whether an independent contractor like B&A would have a cause of action for

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lacks the essential element of an employer/employee relationship. *See also, e.g.*, *White v. City of Ladue*, 422 S.W.3d 439, 445 (Mo.App.E.D. 2013); *Davis v. Jackson County*, 2016 WL 4098532, *5-6 (W.D.Mo. July 28, 2016); *Megl v. SHC Services, Inc.*, 2015 WL 4427732, *3 (E.D.Mo. July 17, 2015).

wrongful discharge in violation of public policy. Any dicta in that case cannot undermine the clear, unequivocal statements in *Farrow* and a host of other Missouri appellate opinions that a public policy wrongful discharge cause of action requires an employer/employee relationship.

3. No Jurisdiction Anywhere in the Country Has Recognized a Common Law Claim for Wrongful Discharge of an Independent Contractor Like B&A

State and federal courts throughout the country have affirmatively rejected common law claims by independent contractors for wrongful discharge in violation of public policy.[10] The circuit court concluded as its third reason for summary judgment

[10] *See, e.g.*, *Adams v. Am. Family Mut. Ins. Co*., 1999 WL 386913, *1 (9th Cir. May 21, 1999) (Arizona law); *Birchem v. Knights of Columbus*, 116 F.3d 310, 315 (8th Cir. 1997) (North Dakota law); *McNeill v. Security Ben. Life Ins. Co*., 28 F.3d 891, 893 (8th Cir. 1994) (Arkansas law); *Allen v. D.A. Foster Co*., 2015 WL 1622097, *3 (E.D. Va. Apr. 10, 2015); *IOSTAR Corp. v. Stuart*, 2009 WL 270037, *18-19 (D. Utah Feb. 3, 2009); *Wisniewski v. Medical Action Ind., Inc.*, 2000 WL 1679612, *3-4 (D. Colo. Sept. 27, 2000); *Robinson v. Ladd Furniture, Inc.*, 872 F.Supp. 248, 252-53 (M.D.N.C. 1994) (California and North Carolina law); *Cogan v. Harford Mem'l Hosp*., 843 F.Supp. 1013, 1022 (D. Md. 1994); *Werner v. New Balance Athletic Shoe, Inc.*, 824 F.Supp. 890, 893 (D. Minn. 1993); *Professional Network, Inc. v. Wash. Dept. of Social and Health Services*, 2011 WL 395989 , *3-4 (Wash. App. Jan. 31, 2011); *Gager v. River Park Hosp.*, 2010 WL 4244351, *2, *4 (Tenn. App. Oct. 26, 2010); *Perron v. Hood Industries,*

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

that a cause of action for wrongful discharge of an independent contractor would "be unprecedented not just in Missouri, but unprecedented *anywhere* in this country." Appx-A35 (emphasis in original).

B&A concedes that "many state courts that have considered the issue have refused to apply the public policy claim to independent contractors." B&A Substitute Brief 40. Nevertheless, B&A cites four cases for the proposition that this Court should recognize such a claim. None of these cases support B&A's argument.

Harper v. Healthsource New Hampshire, Inc., 674 A.2d 962 (N.H. 1996), involved a participating physician with an HMO. The New Hampshire Supreme Court found that the relationship was not, "[s]trictly speaking," either an employer/employee relationship or an independent contractor relationship. *Id.* at 965. Relying on the unique nature of the relationships (1) between the HMO and its preferred provider physicians, and (2) between the physicians and their patients, the court concluded that in this limited

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Inc., 2007 WL 2458472, *8 (Ohio App. Aug. 31, 2007); *Harvey v. Care Initiatives, Inc.*, 634 N.W.2d 681, 686 (Iowa 2001); *Sistare-Meyer v. Young Men's Christian Association of Metropolitan Los Angeles*, 58 Cal.App.4th 10, 18 (Cal.App.2 Dist. 1997); *MacDougall v. Weichert*, 677 A.2d 162, 166 (N.J. 1996); *Ostrander v. Farm Bureau Mut. Ins. Co.*, 851 P.2d 946, 949 (Idaho 1993); *New Horizons Electronics Marketing, Inc. v. Clarion Corp. of America*, 561 N.E.2d 283, 285 (Ill.App.2 Dist. 1990), *rev. denied*, 567 N.E.2d 334 (Ill. 1991); *Ziehlsdorf v. Am. Family Ins. Grp.*, 1990 WL 149183, *2 (Wis. App. Jul. 18, 1990), *rev. denied*, 461 N.W.2d 446 (Wis. 1990).

context, a physician had a cause of action if the HMO's decision to terminate without cause was "made in bad faith or based upon some factor that would render the decision contrary to public policy." *Id.* at 966.

The New Hampshire Supreme Court has never extended this cause of action to independent contractors generally. *See Melvin v. NextEra Energy Seabrook, LLC*, 2010 WL 99095, *2 (D.N.H. Jan. 6, 2010) (reviewing New Hampshire law and concluding wrongful discharge cause of action available only for employees at will). And the logic of *Harper* has not been followed by other state courts even in the context of healthcare providers. *See, e.g.*, *Windisch v. Hometown Health Plan, Inc*., 2015 WL 3649776, *2 (Nev. June 9, 2015) ("such a policy decision is more appropriately considered by the Legislature").

B&A also cites two cases from New Jersey: *D'Annunzio v. Prudential Ins. Co.*, 927 A.2d 113 (N.J. 2007), and *New Jersey Psychological Ass'n v. MCC Behavioral Care*, 1997 WL 33446538 (D.N.J. Sept. 17, 1997). B&A Substitute Brief 41-42. Neither case addresses whether an independent contractor can maintain a common law public policy wrongful discharge claim. Nor do they overrule the New Jersey Supreme Court's decision in *MacDougall v. Weichert*, 677 A.2d 162, 166 (N.J. 1996), which held that the wrongful discharge doctrine "does not protect independent contractors." *D'Annunzio* dealt with the statutory definition of employee under a New Jersey whistleblower statute and not a common law wrongful discharge claim. The district court opinion in *New Jersey Psychological Ass'n*, like *Harper*, involved the unique relationship between medical service providers and HMOs. *New Jersey Psychological Ass'n*, 1997 WL

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

33446538, at *3. Almost twenty years after *New Jersey Psychological Ass'n*, it remains the law in New Jersey that "[i]ndependent contractors are not eligible to pursue a wrongful discharge cause of action." *Chadwick v. St. James Smokehouse*, 2015 WL 1399121, *11 (D.N.J. Mar. 26, 2015) (citing *MacDougall*).

B&A's reliance on a 28-year-old California case, *Caplan v. St. Joseph's Hosp.*, 233 Cal.Rptr. 901 (Cal.App.1 Dist. 1987), is also misplaced. In *Caplan*, the issue was not whether plaintiff was wrongfully terminated, but rather whether defendant had wrongfully retaliated against plaintiff by not paying back wages owed to him. *Id.* at 902-03. The court of appeals concluded a tort action was available to plaintiff because for "all practical purposes" he was an employee. *Id.* at 905. "[H]e was paid a monthly salary, required to follow hospital guidelines, and subject to discharge." *Id*. B&A does not—and cannot—contend that it was an Ameren employee. California opinions since *Caplan* have explicitly rejected the extension of the public policy wrongful discharge cause of action to independent contractors. *Varisco v. Gateway Science and Engineering, Inc.*, 83 Cal.Rptr.3d 393, 394-95 (Cal.App.2 Dist. 2008); *Sistare-Meyer v. Young Men's Christian Ass'n*, 58 Cal.App.4th 10, 16-17 (Cal.App.2 Dist. 1997).

So as the circuit court concluded, B&A is "unable to cite even a single case from **any** jurisdiction, where a court has clearly extended such a cause of action to an independent contractor." Appx-A35 (emphasis in original).[11]

[11] In a strained attempt to find any support for this cause of action outside Missouri, the St. Louis and Kansas City Chapters of the National Employment Lawyers

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

The remaining cases cited by B&A involve federal statutory causes of action which, by their terms, are not limited to employees. For example, in *Brown v. J. Kaz,*

Association ("MO-NELA") cite a Third Circuit opinion and an unpublished Kansas appellate opinion as "more reasonable" cases "willing to assume" the existence of the cause of action for independent contractors. MO-NELA Brief 19 (citing *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107 (3d Cir. 2003); *Kirk v. NCI Leasing*, 2009 WL 112824 (Kan. App. Jan. 16, 2009)). In fact, in neither case did the court reach the question because the cause of action was clearly barred for other reasons. *Fraser*, 352 F.3d at 112 (no evidence that would support wrongful discharge claim even if at-will employee); *Kirk*, 2009 WL 11284, at *6 (barred by statute of limitations).

MO-NELA states the Supreme Court of Oklahoma "has made it unmistakably clear that it would recognize a cause of action in favor of independent contractors," citing the unpublished opinion in *Rosenfeld v. Thirteenth Street Corp.*, Labor & Empl. L. P. 56446, 1989 WL 1837940 (Okla. June 15, 1989). MO-NELA Brief 19. Although the worker in that case had been classified as an independent contractor, the Oklahoma Supreme Court concluded that he was actually an employee under the applicable common law standard. *Rosenfeld*, 1989 WL 1837940 n.2. Moreover, the opinion was withdrawn when the Oklahoma Supreme Court decided certiorari had been improvidently granted. *Rosenfeld v. Thirteenth Street Corp.*, 1989 WL 61959 (Okla. 1989) (Opinion Withdrawn April 20, 1993). "A withdrawn opinion is treated as not having been promulgated." *Collins v. Wanner*, 382 P.2d 105, 108 (Okla. 1963).

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

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Inc., 581 F.3d 175 (3d Cir. 2009), the plaintiff claimed that as a sales representative she was an employee of defendant, a distributor of adjustable beds. The United States Court of Appeals for the Third Circuit found that plaintiff was an independent contractor and not an employee.

Although it upheld summary judgment against the plaintiff on her employment claims, the Third Circuit held that an African-American independent contractor who has been the subject of racial discrimination does have a cause of action under 42 U.S.C. §1981, which provides "all persons . . . shall have the right . . . to make and enforce contracts . . . as is enjoyed by white citizens." The statute defines the phrase "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." 42 U.S.C. §1981(b); *see Brown*, 581 F.3d at 181 n.3. Given this statutory language, the Third Circuit not surprisingly concluded "that an independent contractor may bring a cause of action under section 1981 for discrimination occurring within the scope of the independent contractor relationship." *Brown*, 581 F.3d at 181; *see Danco v. Wal-Mart Stores, Inc.*, 178 F.3d 8, 14 (1st Cir. 1999) ("Section 1981 does not limit itself, or even refer, to employment contracts.").

Cases arising under 42 U.S.C. §1983 are similarly inapposite. In *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996), the issue was whether government officials could terminate a contract because of the independent contractor's exercise of his First Amendment rights. Section 1983 is not limited to an employment relationship and provides a damage action for governmental action that subjects a person "to the

deprivation of any rights, privileges or immunities secured by the Constitution." 42 U.S.C. §1983. Section 1983 cases involve the scope of statutory protection under the federal civil rights laws and not the common law contractual rights of the parties.[12]

No court in any jurisdiction has found that these cases arising under federal civil rights laws support expansion of a common law wrongful discharge cause of action to independent contractors. Indeed, courts have expressly rejected those arguments. *See Vesom v. Atchison Hosp. Ass'n*, 279 Fed. Appx. 624, 639 (10th Cir. 2008) (rejecting argument that *Umbehr* warranted extension of Kansas whistleblower protections to independent contractors), *cert. denied* 555 U.S. 970 (2008); *Sistare-Meyer*, 58

[12] Therefore, MO-NELA is simply wrong when it asserts that "whistleblower claims brought under Section 1983 and the common law of Missouri" "both sound in tort" or are otherwise similar. Claims under §1983 are clearly statutory. Moreover, the burden of proof in §1983 cases is more demanding than that imposed on an employee in a Missouri common law wrongful discharge action. *Compare Umbehr*, 518 U.S. at 675 (plaintiff must prove conduct constitutionally protected and that it was substantial or motivating factor in termination; government can escape liability by showing it would have terminated anyway) *with* MAI 38.03 (employee must prove conduct "was a contributing factor in his/her discharge").

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Cal.App.4th at 18 (*Umbehr* provides no guidance on whether wrongful discharge claim should be extended to independent contractors).[13]

4. There is No Public Policy Justification for Extending a Wrongful Discharge Claim to Independent Contractors

B&A is asking this Court to recognize a cause of action that jurisdictions throughout this country have found unwarranted and that would fundamentally change the law of contracts in this State. It would transform what this Court has termed "a very narrowly drawn" exception to the employment-at-will doctrine into a sweeping, unprecedented restriction on freedom of contract among independent individuals and entities.

This Court noted in *Margiotta* that the ability to terminate a commercial relationship is "[r]ooted in freedom of contract and private property principles, designed to yield efficiencies across a broad range of industries." 315 S.W.3d at 346 (internal citations omitted). In *Fleshner*, this Court found the special and limited circumstances of the employer/employee relationship justified a narrow, well-defined exception to these principles in the form of a public policy/wrongful discharge cause of action for employees. There is no comparable justification in the context of independent

[13] The remaining cases cited by B&A involve statutory causes of action under the Sarbanes-Oxley Act and the Rhode Island Civil Rights Act which, by their terms, are not limited to employees. They are simply irrelevant to the issues raised on this appeal.

contractors, and there are important countervailing public policy considerations that weigh against the expansion of this cause of action—many of which are illustrated by the facts of this case.[14]

a. The Differences Between Independent Contractors and Employees

As the circuit court noted as its fourth reason for summary judgment, "there are real and meaningful differences between employees and independent contractors," which "largely explain why the law has generally chosen not to extend the wrongful discharge cause of action to independent contractors." Appx-A36. The public policy exception to the employment at-will doctrine arose out of the inequality of bargaining power between employees and employers. *Id*. The burden of at-will employment falls most heavily upon employees who do not have individually negotiated contracts and are therefore most vulnerable to employers' improper demands. *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d

[14] B&A and MO-NELA both cite for support a law review article, Bernt, *Wrongful Discharge of Independent Contractors: A Source-Derivative Approach to Deciding Who May Bring a Claim for Violation of Public Policy*, 19 Yale. L. & Pol'y Rev. 39 (2000). Although this article acknowledges that public policy cases require "balancing the interests of the employee, the employer, and the public," *id.* at 47, it fails to address the public policy considerations that weigh against extending the cause of action to independent contractors. In the 16 years since its publication, no court has adopted its reasoning.

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

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859, 877-78 (Mo.App.W.D. 1985). The public policy exception "encourag[es] employers to refrain from coercing employees into a dilemma of choosing between their livelihoods and reporting serious misconduct in the workplace." *Keveney*, 304 S.W.3d at 103.

The circuit court emphasized that an independent contractor "can choose its customers, can take on other work, move on to other customers, etc., if it becomes dissatisfied with a particular customer relationship." Appx-A37-38; *see also K&D Auto Body, Inc. v. Div. of Employment Sec.*, 171 S.W.3d 100, 109 (Mo.App.W.D. 2005) ("An independent contractor . . . is free to work when and for whom he or she chooses."). B&A was a corporation with its own vehicles, equipment and employees. It did work for a variety of clients. Bishop Dep. (5/14) 113, 118 (LF001065, LF001067). Exercising its right as an independent contractor, B&A turned away other clients that were "slow pay" or had disputes with B&A about its invoices. Bishop Dep. (5/14) 113-16 (LF001065-66); Bishop Dep. (11/14) 198 (LF001217). Although B&A may have made a business decision to devote the majority of its time to Ameren, Bishop conceded that ***this was B&A's decision*** and does not change the fact it was indisputably free to work for other customers.[15] The court of appeals also noted that "independent contractors, unlike most

[15] Ironically, B&A made this decision because Ameren treated it better than B&A's other customers. *See supra* at pp. 6-7. It is the freedom to accept other work that distinguishes independent contractors from employees and not how the contractor chooses to exercise (or not exercise) that freedom. *E.g.*, *Quality Medical Transcription,*

employees, retain the right to control the manner or means by which results determined by the user of the contractor's services are to be accomplished."[16] Memorandum

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Inc. v. Woods, 91 S.W.3d 181, 187-88 (Mo.App.W.D. 2002) (lack of restriction on other gainful employment supports contractor status under Missouri law).

[16] There is no dispute in this case that B&A is an independent contractor. Facts, ¶1 (LF000687). Nevertheless, in its brief in this Court, B&A asserts for the first time that Ameren "was exercising detailed control over B&A's work." B&A Substitute Brief 44. This assertion is not supported by B&A's citations or anything else in the record. B&A claims that "Ameren's managers were telling B&A not to follow its usual practice of using pipe inspection cameras to inspect for internal blockages and damage, and telling B&A to stop making photographic reports to document B&A's work." *Id.* However, there is no occasion identified anywhere in the record when Ameren supervisors instructed B&A not to use a camera or prepare a photo report. Rather, in the portion of the record cited by B&A, Bishop testified an Ameren supervisor questioned whether B&A needed to use the camera as frequently as it did. Bishop Dep. (5/14) 222-24 (LF001094). The camera was charged to Ameren as an equipment cost, and cameras were not used by other plumbing companies. Bishop Dep. (5/14) 87, 95-98 (LF001059, LF001061-62). Bishop also testified a supervisor on one job questioned whether B&A was charging Ameren for the time spent to prepare photo reports. Bishop Dep. (5/14) 90-91 (LF0001060). B&A in fact prepared a photo report on that job after agreeing not to charge for it. Bishop Dep. (5/14) 358-59 (LF001129). Obviously, an owner's right to

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Supplementing Order Affirming Judgment Pursuant to Rule 84.16(b), included in Respondents' Appendix ("Resp. Appx") A7.

Courts in other jurisdictions have relied on these important distinctions between employees and independent contractors in rejecting wrongful discharge claims by independent contractors. *See, e.g.*, *MacDougall v. Weichert*, 677 A.2d 162, 166 (N.J. 1996); *New Horizons Electronics Marketing, Inc. v. Clarion Corp. of America*, 561 N.E.2d 283, 285 (Ill.App.2 Dist. 1990). The circuit court in this case quoted at length from the appellate opinion in *Sistare-Meyer v. Young Men's Christian Ass'n*, 58 Cal.App.4th 10, 16-17 (Cal.App.2 Dist. 1997), which discussed the justification for the employee/independent contractor distinction:

> Independent contractors typically have greater control over the way in which they carry out their work than employees, and businesses assume fewer duties with respect to independent contractors than employees. . . . Thus, the independent contractor status provides the hiring party and the worker with an alternative relationship that gives each more freedom and flexibility than the employer-employee relationship.

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question the cost and scope of an independent contractor's work does not convert that contractor into an employee or constitute "detailed control" over that work.

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Significantly, courts in all of the jurisdictions cited above recognize wrongful discharge claims on behalf of contract employees but not independent contractors.[17] Therefore, this Court's holding in *Keveney* that a contract employee may bring a claim for wrongful discharge in violation of public policy does not legally or logically justify—and in other jurisdictions has not justified—an expansion of the cause of action to include independent contractors. As the circuit court pointed out, the analogy to a contract employee is even more attenuated here because the independent contractor in this case, B&A, is not an individual but a corporate entity. Appx-A38.[18]

b. There are Compelling Public Policy Reasons Not to Extend the Wrongful Discharge Cause of Action to Independent Contractors

Creating an ill-defined public policy wrongful discharge claim in the context of commercial business relationships would fundamentally alter the law of contracts in this

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[17] *See Gen. Dynamics Corp. v. Superior Court*, 876 P.2d 487, 497 (Cal. 1994); *Lepore v. National Tool and Mfg. Co.*, 540 A.2d 1296, 1300-01 (N.J.Super.A.D. 1988); *Midgett v. Sackett-Chicago, Inc.*, 473 N.E.2d 1280, 1283-84 (Ill. 1984).

[18] MO-NELA's brief expresses concerns about businesses misclassifying employees as independent contractors. MO-NELA Brief 22-23. These concerns are irrelevant to this case, as there is no dispute that B&A was at all times an independent contractor and that neither B&A nor Bishop was ever an employee of Ameren. Facts, ¶¶1-4 (LF000687-89). All the indicia of independent contractor status are present in this case. *See Howard v. City of Kansas City*, 332 S.W.3d 772, 781 (Mo. banc 2011).

State. An extension of the wrongful discharge tort to commercial contracts risks "turning every breach of contract dispute into a punitive damage claim," thus leading to a "potential Pandora's box." *Harris v. Atlantic Richfield Co.*, 14 Cal.App.4th 70, 81 (Cal.App.5 Dist. 1993). Rather than being the "very narrowly drawn" cause of action described in *Margiotta*, 315 S.W.3d at 346, wrongful discharge claims by independent contractors would rewrite the law of contracts by imposing obligations that were never agreed to, or even contemplated, by the parties.

The implications of imposing these restrictions—and the litigation they will engender—on independent parties to a business relationship are not acknowledged in B&A's Substitute Brief or in the supporting amici briefs. They are recognized, however, in the sources they cite. MO-NELA, for example, cites Eisenach, *The Role of Independent Contractors in the U.S. Economy* (Navigant 2010). The study emphasizes the substantial economic and other benefits that the independent contractor relationship confers on both parties. Rather than independent contractors being racked with uncertainty about their futures as suggested by MO-NELA, MO-NELA Brief 12, the Eisenach study reported that survey data in the U.S. "has consistently found that independent contractors prefer their jobs to employment." Eisenach, *supra*, at 33.

Imposing non-contractual limitations on terminating or discontinuing these relationships make them less efficient and desirable.

> The economic and social costs of independent contracting are difficult to discern, especially given that independent contractors are far more likely than traditional employees to like their work. The economic benefits of

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> independent contracting, on the other hand, are substantial. Policies that make it more difficult for workers and firms to enter into such arrangements would thus result in slower economic growth, lower levels of employment and job creation, and lower consumer welfare overall.

Eisenach, *supra*, at 42. As explained in a Columbia University study also cited in MO-NELA's brief, "Enacting various new laws and amendments to limit the use of contracting may lead to job loss, lower economic productivity and decreased competitiveness in the global market as well as reduced economic growth in general." Cohen & Eimicke, *Independent Contracting: Policy and Management Analysis*, (Columbia Univ. 2013) at 85, *available* at http://www.columbia.edu/~sc32/documents/IC_ Study_Published.pdf.

A decision by this Court to impose a common law wrongful discharge restriction on independent contractor relationships, while other state courts have refused to do so, will only ensure that these negative consequences are concentrated in Missouri. This will be particularly harmful to independent contractors. A business will be understandably less willing to hire an independent contractor for a particular job if it believes it may be sued or be the subject of a regulatory complaint if it chooses another contractor for the next job.

The impact of such a cause of action is evident in this case. While both B&A and MO-NELA assiduously avoid any discussion of the actual business relationship between

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B&A and Ameren,[19] the court of appeals and circuit court in this case did not. B&A "provided plumbing services at Ameren facilities in the St. Louis area on an as-needed basis." Resp. Appx-A2.

> [U]nder the Purchase Order which Ameren issued to B&A and which undergirded the agreement, Ameren had no obligation to use B&A on any plumbing job ***and*** could discontinue the use of B&A's services at any time.

Appx-A42 (emphasis in original). Ameren hired B&A to do specific jobs and was free to use other plumbers. B&A was paid on a time and materials basis for each job.

Under the guise of a wrongful discharge claim, B&A seeks to transform the relationship entirely. Despite Ameren's right to use other plumbers, Bishop testified that he regarded the decision to bid jobs B&A had performed in the past as an "attack" on B&A. Bishop Dep. (5/14) 308-11 (LF001116-17). Despite the absence of any contractual obligation to use B&A's services, Bishop maintained that Ameren had an obligation to permit B&A to do routine maintenance at Ameren facilities when B&A chose to do so, and that Ameren did not even have the right to be notified of B&A's intent to do work on Ameren properties. Bishop Dep. (5/14) 467-69 (LF001157). Bishop even claimed Ameren's decision not to give B&A a three-year exclusive contract

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[19] While B&A refers to it vaguely as a "business relationship," *e.g.*, B&A Substitute Brief 4, MO-NELA refers to it as a "valuable contract" "terminable at will." MO-NELA Brief 1, 13. Both briefs ignore the actual terms of the relationship.

for more than Ameren had paid for plumbing services in the past was evidence of retaliation. Bishop Dep. (5/14) 346 (LF001126).

This case illustrates how a disgruntled contractor can recast routine maintenance reports as "whistleblowing" and allege the failure to give him work, or a decision to solicit bids, is evidence of retaliation. The only way Ameren could have insulated itself from B&A's allegations of "retaliation" was to continue to use B&A indefinitely despite no contractual obligation to do so. This would include allowing B&A to self-generate work by showing up at times of its choosing and billing Ameren for whatever work B&A deemed necessary. Such a result not only strips Ameren of the most fundamental rights of property ownership, but it destroys the efficiency and flexibility that otherwise commend independent contractors. Eisenach, *supra*, at 29, 42 (independent contractor relationships "contribute to the flexibility and dynamism of the U.S. workforce"); Cohen & Eimicke, *supra*, at 15 (independent contracting affords businesses and contractors "greater flexibility" and "greater efficiency").

Ameren paid B&A about $2 million from 2007 to 2010 to fix plumbing problems and clean drain lines—an extraordinary sum for a small plumbing company. Ex. Bishop 2 (LF000759). At the end of 2008, Bishop regarded Ameren as a company that was attempting to do things the right way. Bishop Dep. (5/14) 144-47 (LF001073-74). The record reflects that his opinion changed after he was told in early 2009 that, in light of the economy, work needed to be reviewed and there would be increased use of competitive bidding. Ex. D-18 (LF000452); Bishop Dep. (5/14) 160 (LF001078). Bishop expressed concerns B&A could not compete and began claiming that any reduction in B&A's

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

services "creates environmental issues & safety liabilities for Ameren." Ex. D-35 (LF000462-63). Indeed, B&A claimed that the very plumbing issues Ameren had hired it to correct were now evidence of "serious misconduct"—even though many of those conditions arose and were corrected during the period when Bishop lauded Ameren for attempting to do things the right way. When Ameren decided not to use its services, but rather to use one of a number of other approved plumbing contractors, B&A alleged it was being retaliated against for advising Ameren of these so-called "violations" that Ameren had either paid B&A to correct in the past or that B&A speculated would occur in the future.

Independent contractors have very different financial incentives than employees. Traditional independent contractors like B&A are usually paid by the job and compensated based on the scope of work. *See Howard v. City of Kansas City*, 332 S.W.3d 772, 781 (Mo. banc 2011) (independent contractors are typically "paid a fixed sum on a by-the-job basis"). It is in their self-interest to create more jobs and to expand the scope of work on each job because it determines their compensation. *See* Ex. D-17 (LF000884) (email from Robert Bishop stating that "my entire existence depends upon staying busy"). A salaried or hourly employee (at-will or contract) does not have the same incentives. The court of appeals observed that "[t]he threat of a wrongful discharge cause of action would give unscrupulous independent contractors a uniquely exploitative tool for expanding the scope of work by pointing out additional real or purported public-policy 'violations' and then threatening to report the alleged violation unless the owner agrees to authorize the contractor to fix it." Resp. Appx-A7. This is hardly "alarmism."

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

MO-NELA Brief 17. Not only is the risk evident from the facts of this case, but the conduct of independent contractors is one of the most common subjects of consumer complaints in Missouri. *See* Top 10 Consumer Complaints Reported to Office of Missouri Attorney General in 2015, *available at* ago.mo.gov/divisions/consumer/top-10-consumer-complaints (complaints involving home repair contractors No. 7).

No jurisdiction has seen the need to create the cause of action sought by B&A and, as the court of appeals observed, "there are actually strong public policy arguments for *not* extending the wrongful discharge cause of action to independent contractors." Resp. Appx-A7 (emphasis in original). Recognizing such a cause of action in Missouri would indeed be "'adventuring when no rescue appears to be called for.'" Appx-A35 (quoting *Awana v. Port of Seattle*, 89 P.3d 291, 294-95 (Was. App. 2004)).

In cases where it has confronted competing public policy considerations, this Court has concluded that "[t]he choice is really a public policy decision that we believe the legislature is best equipped to make."[20] *Powell v. American Motors Corp.*, 834

[20] This is illustrated by the amicus brief submitted by the Missouri Coalition for the Environment ("MCE"). It asserts that courts have "recognized the important role whistleblowers play in the enforcement of the nation's environmental laws." MCE Brief 4. But none of the cases cited by MCE in its brief involve common law wrongful discharge claims. Rather, they all involve claims arising under environmental statutes. Therefore, the cases and statutes cited by MCE show not only that companies like Ameren are already subject to extensive environmental regulations, but also that

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

S.W.2d 184, 189 (Mo. banc 1992) (considering whether there should be common law cause of action for loss of parental or filial consortium); *see also First Bank v. Fischer & Frichtel, Inc.*, 364 S.W.3d 216, 222 (Mo. banc 2012) (citing *Powell* for the proposition that "the balancing of competing public policies is best left to the legislature"). In *Powell*, jurisdictions outside Missouri were split on whether there was a common law cause of action for loss of parental or filial consortium. The Court viewed this split "as further evidence that there are meritorious policy arguments on opposing sides of these issues and as further support for our conclusion that this Court should defer to the Missouri legislature." *Powell*, 834 S.W.2d at 189. Rejection of the cause of action and deference to the legislature is even more appropriate here, where a proposed common law cause of action has been overwhelmingly rejected by other jurisdictions and portends fundamental changes in business relationships within the State.

C. Summary Judgment Was Appropriate on the Alternative Ground That B&A Was Not a Whistleblower

The court of appeals affirmed the circuit court's judgment that independent contractors do not have a public policy/wrongful discharge cause of action. But even if independent contractors had such a cause of action, the court of appeals concluded Ameren would still be entitled to summary judgment on the wrongful discharge claim because B&A was not engaged in whistleblowing activity.

Congress and state legislatures are more than capable of fashioning appropriate whistleblower protections when the societal benefits of that protection exceed the costs.

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

1. B&A Cannot Show it Was a Whistleblower Because it Did Not Report the Alleged Misconduct to Superiors or Public Agencies Before the Termination of its Relationship with Ameren

The court of appeals explained why B&A was not a whistleblower under the undisputed facts of this case.

> To be a whistleblower within the context of a wrongful discharge claim, the plaintiff must have "[r]eported wrongdoing or violations of law to *superiors or public authorities.*" *Drummond v. Land Learning Foundation*, 358 S.W.3d 167, 170 (Mo.App.W.D. 2011) (emphasis added) (quoting *Fleshner*, 304 S.W.3d at 92) (internal quotation marks omitted). Because Bishop is an independent contractor, its alleged "whistleblowing" to Ameren does not constitute a report to a "superior" – Bishop and Ameren are independent businesses. Moreover, Bishop admitted that it did not make any report to any public authority before the alleged wrongful discharge. Bishop simply cannot show that it was a whistleblower.

Resp. Appx-A7-8. An appellate court "may affirm if the record shows that summary judgment was appropriate either on the basis it was granted by the trial court or on an entirely different basis, if supported by the record." *Brehm v. Bacon Township*, 426 S.W.3d 1, 4 (Mo. banc 2014).

In *Drummond v. Land Learning Foundation*, the plaintiff was employed as the president of entities owned by two brothers. He suspected the two brothers were engaged in tax fraud and reported his suspicions to them. The brothers then terminated him. After

he was terminated, he contacted the IRS and the Army Corps of Engineers to report his concerns. He then brought his claim for wrongful discharge. The circuit court granted summary judgment "finding that neither Mr. Drummond's report of wrongdoing to the suspected wrongdoers nor his report to government officials after his termination constituted whistleblowing within the public policy exception to the employment at-will doctrine." 358 S.W.3d at 169.

The Western District Court of Appeals affirmed. It noted that reporting wrongdoing to the alleged wrongdoers is not whistleblowing. *E.g. Jones v. Galaxy 1 Marketing, Inc.*, 478 S.W.3d 556, 564 (Mo.App.E.D. 2015) (reporting to wrongdoers "does not expose the wrongdoers"). And while an employee's superiors can constitute the proper authority, Drummond had no superiors other than the brothers to whom to report the alleged tax fraud. The court of appeals held that the report to the brothers was insufficient to constitute whistleblowing. While it acknowledged that "those employed by small companies have fewer options for internal reporting," this did not obviate the requirement that the employee report wrongdoing to superiors or public authorities. For those employees who have no superior to whom they can report, there remains the option to report their concerns to "a third party public authority." *Drummond*, 358 S.W.3d at 172. Since Drummond did not make his reports to public authorities until after his termination, he could not state a claim for wrongful discharge in violation of public policy. *See also Weng v. Washington Univ.*, 480 S.W.3d 334, 343-44 (Mo.App.E.D. 2015) (allegations raised only after employer decided to terminate employee cannot give rise to wrongful discharge claim).

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

B&A was not an employee of Ameren. Robert Bishop was an employee of B&A. No one at Ameren was Bishop's or B&A's superior. B&A's reports of alleged wrongdoing to the EPA, MDNR, MSD and St. Louis County were all made after B&A was informed Ameren would no longer use its services. Therefore, the court of appeals correctly concluded that Ameren was entitled to summary judgment because B&A was not a whistleblower within the meaning of the wrongful discharge cases.

2. B&A Was Not a Whistleblower Because its Alleged "Whistleblowing" Reports Were Made as Part of its Job Duties

There is a second reason B&A is not a whistleblower beyond that identified by the court of appeals. B&A alleges in its Amended Petition that it was hired to "perform[] plumbing and other diagnostic and service related work for the defendant companies." Amended Petition, ¶8 (LF000130). B&A alleges that in the process of performing this work, it reported "work that had been done improperly in the past, by other contractors or by unlicensed personnel" that it reasonably believed resulted in violations of the law. *Id.*, ¶12 (LF000130).

In other words, B&A was retained to identify plumbing issues and correct them. In the normal course of providing these services, it reported problems to be addressed and described the work it performed. While the issue has not been addressed in Missouri, other jurisdictions have concluded that even in the case of employees, if the regular duties of an employee include reporting the issues that are subsequently characterized as whistleblowing, the plaintiff fails to state a claim for wrongful discharge in violation of public policy. *See, e.g.*, *Maro v. Sizemore Security Int'l, Inc.*, 678 So.2d 1127, 1128

(Ala. App. 1996) (plaintiff's reporting of safety violations at employer's plant was in performance of her job duties as security, fire and safety watch officer and therefore statute providing no employee shall be terminated for filing written notice of safety rule did not apply).

In this case, B&A's alleged whistleblowing claims are based on work Ameren paid B&A to perform. The resulting reports have now been recast as "whistleblowing." If this is indeed sufficient for making a claim for wrongful discharge in violation of public policy, any maintenance or repair service could resurrect old maintenance reports and claim the description of the repair job was whistleblowing, even though that was not the intent when the report was created. As the Minnesota Supreme Court has explained, "the rationale for looking at the reporter's purpose at the time the report is made is to ensure that the report that is claimed to constitute whistle-blowing was in fact a report made for the purpose of exposing an illegality and not a vehicle, identified after that fact, to support a belated whistle-blowing claim." *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 202 (Minn. 2000).

B&A did not make any reports to "superiors" or public agencies about alleged wrongdoing or violations of law before being informed that Ameren would no longer use its services. Moreover, the alleged reports of "wrongdoing or violations of law" were actually old job reports on work Ameren had requested and paid B&A to perform. B&A's activity was not "whistleblowing" and could not sustain a wrongful discharge cause of action even if that action were extended to independent contractors.

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

D. Summary Judgment Was Proper on the Alternative Basis That B&A Failed to Create Any Genuine Issue of Fact That it Reported Serious Misconduct Constituting a Violation of Law

B&A asserts that it "provided extensive documentation to numerous Ameren managers regarding the detrimental impact that this reduction [in B&A's services] was having on Ameren, creating risks to the lives, health and safety of the public and Ameren's employees, and on Ameren's compliance with environmental laws, [MSD] rules and regulations, state plumbing statutes, and local plumbing codes and ordinances." B&A Substitute Brief 6. Yet as noted in Section I(C) above, the documents B&A submitted to Ameren in 2010 were generally old job reports, or photos from these reports, relating to work B&A performed—and Ameren had paid for—months or years earlier. B&A's purpose in submitting them to Ameren in 2010 was clearly to convince Ameren to continue to use B&A without competitive bidding. These job reports do not address current conditions, identify any specific violation of the law, or characterize any condition as a risk to "lives, health and safety" of the public or Ameren's employees.[21]

[21] In each round of briefing, B&A's characterization of the conditions it corrected at Ameren, and the impact of Ameren's reduced use of B&A's services, has become more melodramatic. The threat has evolved from "violations of laws, regulations and rules" in the circuit court to a "detrimental impact" creating risks to "lives, health and safety" in this Court. B&A Opp'n to Mot. for Summary Judgment 2 (LF001510); B&A Substitute Brief 6.

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Even if a claim for wrongful discharge in violation of public policy were available to independent contractors, which it is not, Ameren would be entitled to summary judgment since B&A failed to create a genuine issue that it reported (1) "*serious* misconduct" that (2) "constitutes a violation of the law and of . . . *well established* and *clearly mandated* public policy." *Margiotta*, 315 S.W.3d at 347 (internal citation omitted; emphasis in original).[22] In its opposition to summary judgment, B&A did not produce any competent, admissible evidence that it reported an actual violation of law, let alone a violation that resulted from "serious misconduct."

1. The Failure to Allege a Specific Violation

B&A broadly asserts that it corrected work that was "illegal," "improper," or not in accordance with code, but does not identify a specific legal requirement and present competent evidence that it was violated by Ameren's conduct.[23] "'[M]ere citation' to [a]

[22] B&A cites the circuit court's observation that "there are at least some genuine issues" related to these elements of a wrongful discharge claim. Appx-A23 n.1. Since it granted summary judgment on other grounds, the court did not identify any specific issue of material fact created by the record, and Ameren respectfully submits there are none.

[23] The Amended Petition asserts that B&A reported to Ameren management that the conditions on Ameren's property violated a number of broad statutory schemes, regulatory schemes and municipal ordinances. *See* Amended Petition, ¶37 (LF000136). However, it does not allege how Ameren violated any specific provision as a result of any conditions reported by B&A. Nor did any of B&A's "reports" or presentations to

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

regulation without a demonstration of how the reported conduct violated it cannot form the basis for a wrongful discharge action." *Margiotta*, 315 S.W.3d at 348. The plaintiff has the burden to show that specific conduct by the defendant violated a specific legal provision that involves a clear mandate of public policy. *Adolphsen v. Hallmark Cards, Inc.*, 907 S.W.2d 333, 338-39 (Mo.App.W.D. 1995); *see Porter v. Reardon Mach. Co.*, 962 S.W.2d 932, 940 (Mo.App.W.D. 1998) (affirming summary judgment because plaintiff failed to specify the legal provision violated by employer and to show that provision involved clear mandate of public policy).

Missouri courts have repeatedly granted dispositive motions when the plaintiff fails to show how the alleged misconduct violated a specific legal requirement. *E.g.*, *Margiotta*, 315 S.W.3d at 347; *Jones v. Galaxy 1 Marketing, Inc.*, 478 S.W.3d 556, 566 (Mo.App.E.D. 2015) (plaintiff must demonstrate that the conduct in question "would have violated either the law or a clear mandate of public policy"); *Yow v. Village of Eolia*, 859 S.W.2d 920, 922 (Mo.App.E.D. 1993) (same). Otherwise, a plaintiff would be free to do what B&A has done in this case, and simply assert that virtually all the work it did over an eight-year period somehow involved conduct violating a litany of broad statutes, leaving it to the defendants and the trial court to sift through the record for

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Ameren officials identify any specific provision that was violated. *See* Exs. Ameren-F, Ameren-G, Ameren-H, Ameren-I, Ameren-J, D-35, D-19, D-25, D-26 (LF000286-421, LF000462-74, LF000895-901, LF000906-25).

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

something that could conceivably be characterized as "serious misconduct" violating any of these laws.

B&A argues that it need only have a "reasonable belief" of unlawful activity. It cites in support *Kelly v. Bass Pro Outdoor World, LLC*, 245 S.W.3d 841 (Mo.App.E.D. 2007), and *Dunn v. Enterprise Rent-A-Car*, 170 S.W.3d 1 (Mo.App.E.D. 2005). These cases, however, pre-date *Fleshner* and *Margiotta*. *Fleshner* recognized that at-will employees have a public policy/wrongful discharge action if they are terminated "for reporting *wrongdoing or violations of law* to superiors or public authorities." *Fleshner*, 304 S.W.3d at 92 (emphasis added). In *Margiotta*, decided on the same day as *Fleshner*, this Court stated, "The pertinent inquiry here is whether the authority *clearly prohibits* the conduct at issue in the action." *Margiotta*, 315 S.W.3d at 347 (emphasis added); *see Zasaretti-Becton v. Habitat Co. of Missouri, LLC*, 2012 WL 2396868, *8 (E.D.Mo. June 25, 2012) ("post-*Margiotta*, a reasonable belief of legal wrongdoing is not itself sufficient to succeed on an unlawful termination claim brought under Missouri's public policy exception to the at-will employment doctrine"). Even if a "reasonable belief" were sufficient, it would still be necessary in order to avoid summary judgment for the plaintiff to present evidence that it reported specific misconduct that it had a reasonable basis to believe violated a specific law—a showing B&A never makes. *Dunn*, 170 S.W.3d at 11 (upholding grant of JNOV to employer on wrongful discharge claim where plaintiff alleged "illegal business practices" but failed to cite any law or clear mandate of public policy with respect to claim).

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Over a period of several months, in order to buttress a wrongful discharge claim, Bishop lobbied the EPA, MDNR, MSD, and St. Louis County plumbing officials to find a violation at Ameren. Facts, ¶¶45-69 (LF000707-12). Yet there is no evidence any authority found the reported conduct was illegal. Facts, ¶69 (LF000712). MSD and MDNR conducted independent investigations of Ameren's facilities and found nothing to substantiate Bishop's claims. Facts, ¶¶53-67 (LF000708-11). In fact, MSD found "much seemed to be contradicted." Ex. D-98 (LF000570-71); Deposition of Alverda Opperman 91-92 (LF001343). As a federal court in Missouri noted in granting summary judgment on a wrongful discharge claim, when there is disagreement as to the correct course of action regarding regulatory compliance, "it is the regulatory agency, not this Court, that will determine whether corporate actions comply." *Bazzi v. Tyco Healthcare Group, LP*, 2010 WL 1260141, *5 (E.D.Mo. Apr. 1, 2010), *aff'd*, 652 F.3d 943 (8th Cir. 2011).

2. There is No Evidence of Hazardous Substances Leaving Ameren's Property

Nevertheless, B&A asserts in its Substitute Brief that its "reports contain evidence of hazardous substances leaving Ameren's property." B&A Substitute Brief 52. Even if this assertion were true, it would still be necessary to present evidence that any release resulted from "serious misconduct." But B&A has presented no competent evidence of hazardous substances leaving Ameren's property, let alone in amounts that would violate any regulation.

There is no dispute Ameren frequently retained B&A to clean oil/water separators and associated drain piping at garage locations where Ameren houses service and

maintenance vehicles and equipment. In its brief, B&A references a 2007 job report involving a Belleville, Illinois facility. B&A cites the report as "showing oil that 'transgresses to a retention basin at the primary street intersection then outfalls to the soil creek system through a residential area.'" *Id.* (quoting Ex. Ameren-F (LF000316)). What the report actually says is: "**Storm piping outfall** from the Ameren IP facility transgresses to a retention basin at the primary street intersection then outfalls to the soil creek system through a residential area." LF000316 (emphasis added). There is no reference to oil reaching the "soil creek system." The report simply describes the pathway of the pipes.

B&A also cites an email it sent to Warren Mueller of Ameren in June 2010 that purports to include a photo that shows "oil in the outfall/creek/retention basin at Belleville." Ex. Ameren-H (LF000351, LF000359). The photo shows a small area of discoloration in the water surrounded by vegetation in no apparent distress. LF000359. B&A did no testing to determine if it was oil, and no evidence was presented regarding its origin.[24] Most significantly, B&A's email indicates the information was sent to Mueller in 2010 not to report on any existing condition, but rather to show "cleanings are necessary" and that B&A was the one "to identify/address through our thorough approach

[24] B&A's expert conceded that he could not say from a photo whether a substance was oil. The substance would need to be sampled. Deposition of Edward Paschal ("Paschal Dep.") 43-45 (LF001393); *id.* at 67 (LF0001397) (sheen on water "could have been caused by something else" other than oil).

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

& due diligence when other providers failed to identify/address." Ex. Ameren-H (LF000351). "[W]e are not expensive we are thorough." *Id.* The email further states that Ameren supervisors "when dealing with me on any of these issues, have gone out of their way to do all they could to address such and were genuine in addressing them expeditiously/correctly." *Id.* This is hardly evidence of misconduct.

B&A also cites a June 2010 email Bishop sent Mueller attaching a 2007 report regarding Ameren's Berkeley facility. Ex. Ameren-I (LF000374-88). Bishop characterizes the report as an "example when garage services was emptying residual remaining in 55 gallon barrels into the outside storm wash separator." LF000374. The 2007 report refers to the barrels causing oil to be found in "the storm sewer on the Ameren property." LF000380. B&A did no testing of the contents of the storm sewer. The report states that the storm sewers were thoroughly cleaned, and it does not reference hazardous substances leaving Ameren's property. LF000376-86. Most significantly, Bishop states in his email that when Ameren supervisors were advised of the barrels in 2007 they "jumped on Garage services" and B&A did not see any subsequent occasions when empty barrels were stored upside down. LF000374.

In the 2008 report regarding the Dorsett facility cited by B&A in its Substitute Brief, the report itself states "the lines were cleaned and recovered to prevent a liability issue for Ameren with MSD and the EPA/MDNR." Ex. P-47 (LF000992). In 2009, B&A reported the lines were cleared "preventing the transgression of by-products to the sanitary system and other related piping systems." Ex. Bishop 1 (LF000749). In its 2010

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

report B&A states it "intercept[ed] by-products before being passed onto Sewer mains & MSD." Ex. P-49 (LF001022).

None of these reports relate conditions that were found to be violations of law by any agency.[25] What these reports reflect is that there were maintenance issues B&A was appropriately hired by Ameren to address. They were not ignored. B&A was paid to identify and correct them. This is the antithesis of "misconduct." Surely, if any of these reports involved violations of law, B&A would have brought them to the attention of the EPA, MDNR or MSD during its months-long campaign to have those agencies validate its allegations. There is no evidence any of these reports were presented to these agencies. Indeed, many of these reports were prepared during the period when Bishop testified he thought the people at Ameren were attempting to do things the right way. Bishop Dep. (5/14) 144-47 (LF001073-74).[26]

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[25] As the MCE Brief states, the principal concern with excessive oil discharges to the MSD sewer system is blockages. MCE Brief 2. It is telling that nowhere in the extensive record in this case are there references to Ameren's operations causing or contributing to any blockages of the MSD sewer system.

[26] The only evidence cited by B&A in its brief as "confirmation" of Ameren's violation of law is a letter Ameren received from MSD in March 2010 regarding truck washing operations. B&A Substitute Brief 14-15. B&A has presented no evidence that Ameren was issued a violation for its truck washing operations. Nor were those operations part of any "whistleblowing" reports by B&A. Ameren manager John Pozzo's

B&A did advise the EPA, MDNR and MSD of its report of "oil leaking from tanks at the Dorsett facility" and "being routed through illegally installed piping." B&A Substitute Brief 53. Bishop first raised this issue in May 2010 in the meeting with Armistead. Bishop acknowledged during his deposition that Ameren followed up on his information. Bishop Dep. (11/14) 142 (LF001202).[27] Although Bishop observed a small pool of oily liquid in a rock trench on Ameren's Dorsett property near a tank farm, he had no information any contaminants from the tank farm migrated off Ameren's property. Bishop Dep. (11/14) 149-50 (LF001203-04). MDNR and MSD did not find any evidence to that effect during their inspections. Nor did either agency find that the plumbing configuration at the tank retention area was improper.[28]

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email simply states that he received information from MSD that washing trucks in a certain manner required a permit and that if Ameren did not want to apply for a permit, it could pursue other options, such as hiring a commercial washing contractor. Ex. P-2 (LF001665-67).

[27] Bishop cites certain emails as showing Ameren managers acknowledged the legitimacy of his reports. B&A Substitute Brief 55-56. What these emails actually show is that Ameren managers responsibly investigated any issues B&A brought to their attention.

[28] As evident from B&A's citations, B&A Substitute Brief 54, federal and state regulation of discharges is generally predicated on contaminants polluting the waters of the State or the navigable waters of the United States. *See, e.g.*, *United States v. Robison*,

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

3. B&A Presented No Evidence of "Serious Misconduct" Involving Plumbing Installations

After B&A's allegations of environmental violations proved unsupported by agency investigations or its own experts, B&A's claims of "serious violations" in this litigation increasingly devolved into accusations that unlicensed and largely unidentified Ameren personnel replaced faucets or toilets in bathrooms, installed water lines for coffee machines or used duct tape on plumbing fixtures. Not surprisingly, no plumbing

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505 F.3d 1208, 1215 (11th Cir. 2007) (Clean Water Act "generally prohibits the discharge of pollutants into 'navigable waters'" (citing 33 U.S.C. §§1311(a), 1362(12)). B&A asserts that the presence of any oil on the ground at Dorsett is a violation of 40 C.F.R. §112. However, B&A's expert acknowledged that a violation of this regulation requires that the discharge get to the navigable waters of the United States. He conceded that he saw no evidence that there was a discharge of petroleum products at Dorsett to the navigable waters of the United States. Paschal Dep. 60-61 (LF001397). *See generally Rapanos v. United States*, 547 U.S. 715, 739 (2006) (plurality opinion) (navigable waters "does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall"). To the extent B&A's expert made other contradictory statements, it cannot create a genuine issue of fact on whether there were violations. *Rustco Products Co. v. Food Corn, Inc.*, 925 S.W.2d 917, 923 (Mo.App.W.D. 1996) (party may not avoid summary judgment when its own witness gives inconsistent testimony).

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official or regulatory authority found these allegations worthy of investigation. Even if there were competent evidence that this did occur, which there was not, this is not evidence of serious misconduct.[29] *See also Bennartz v. City of Columbia*, 300 S.W.3d 251, 258 (Mo.App.W.D. 2009) (noting "Missouri has not recognized violations of city ordinances or municipal regulations to be declarations of public policy").

In its brief, B&A cites what it apparently believes to be its most dramatic examples of plumbing violations. It claims that "the illegal plumbing installations" it

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[29] Bishop himself admitted doing unlicensed plumbing work in Illinois. Bishop Dep. (11/14) 96-97 (LF001190). B&A also mischaracterizes respondent George's email in July 2010 regarding his conversation with plumber William Linek. B&A Substitute Brief 16. George was following up on B&A's claim that certain plumbing work could not be done by in-house personnel. George did not express the opinion that "what the City doesn't know about, they don't know about." Rather, that was George's characterization of Linek's vague response. George did report Linek's statement that "there are many companies who have their own maintenance staff who replace closets, urinals, water cooler, sinks" and "plumbing contractors do not get very excited about not being called." Ex. Bishop 3 (LF000760). Even though B&A's "illegal plumbing" concerns focused on Ameren's headquarters in the City of St. Louis, there is no evidence that B&A at any time deemed these concerns worthy of bringing to the attention of City plumbing inspectors, including during the period it was lobbying the EPA, MDNR, MSD and St. Louis County.

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reported included "cross connections between waste systems and drinking water" creating a risk of "serious, life-threatening, illnesses such as Legionnaire's Disease." Substitute Brief 50-51. However, the reports upon which B&A relies do not support B&A's description of the nature and significance of these installations.

In its PowerPoint in support of its January 2010 fixed price proposal, B&A refers to "costly corrections" B&A had to make to the East breakroom/restroom in Ameren's headquarters building ("GOB") "due to improper plumbing installations." Ex. D-26 (LF000914). The photo caption refers to "illegal connection to vent piping introducing waste causing blockages in vent & waste stacks down to basement GOB." *Id.* It then says the "[c]ost of corrections/ re pipe and clearing basement mains, $35,597.00." *Id.* B&A provided a similar photo to Armistead in May 2010. Ex. D-35 (LF000940). In June 2010, it forwarded the same photo to Warren Mueller of Ameren with an email that refers to "cross connections with a class 1 hazard item that I feel needs immediate addressing." Ex. Ameren-G (LF000337, LF000347). The email does not acknowledge the installation had been corrected months earlier. Even if the installation was improper, and B&A has never cited the specific code provision it violated, Ameren had paid B&A $35,597 to correct it and other plumbing issues months earlier. Ex. D-26 (LF000914). B&A did not state in its reports or its summary judgment pleadings that this was an improper connection to "drinking water, threatening life, health and safety." *See* B&A Opp'n to Mot. for Summary Judgment 12-14 (LF001520-22). Rather, the connection was faulted for "causing blockages" in a section of piping at Ameren's headquarters.

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

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The other alleged "cross-connection" cited in B&A's Substitute Brief is referenced in an email Bishop wrote to Scott Held of Ameren in February 2010 regarding B&A's fixed-price proposal. Held was following up on a comment Bishop made in his fixed price proposal and asked, "What illegal/improper work has been performed by in-house personnel?" Ex. D-27 (LF000928). Bishop responded with the comment only partially quoted in B&A's Substitute Brief. The full quote states:

> [A]nd one of the worse applications (I have to dig the picture out of the archives), someone in-house took a copper tube with a valve and drilled a waste stack and tied it into the waste (yes, domestic drinking water tied into the sanitary waste stack), as an attempt to have the stack "washed" with a constant flow of water. **I cut that out back in 2003 or so.**

Ex. D-27 (LF000926) (emphasis added). Thus Bishop was reporting a condition that had been observed and corrected seven years earlier. Bishop testified he thought someone told him that this installation was done by a maintenance person who had been terminated. Bishop Dep. (5/14) 294-96 (LF001113). However, he could not recall the names of either the person who was terminated or who told him about it. *Id.*

Even if these two "cross connection" installations were incorrect, Ameren paid B&A to correct them months and years before Ameren ended its business relationship with B&A. There was no evidence presented that they were the result of "serious misconduct" or presented an actual or potential connection to a "public water system." B&A Substitute Brief 51. In fact, there was no evidence of the circumstances of either installation, including whether they were performed by Ameren personnel or independent

plumbing contractors. As for B&A's recent assertion that these connections violated MDNR regulations in addition to the plumbing code, it is again telling that there is no evidence they were the subject of Bishop's complaints to MDNR or the EPA in the Fall of 2010. Nor is there evidence they were the subject of any complaints to the Plumbing Section of the City of St. Louis.

4. B&A's Claims of Serious Misconduct Are Actually Based on Speculation

In light of the weakness of its argument that past reports showed Ameren engaged in "serious misconduct" that violated the law, B&A claimed in opposition to summary judgment that it only has to show it reported violations that "would have actually occurred if not for the instrumental intervention of Plaintiff." B&A Opp'n to Mot. for Summary Judgment 42 (LF001550). This argument, however, would make every repairman a "whistleblower" because a repairman is often hired to prevent a condition from progressing to a violation. B&A also ignores that this "intervention" was at Ameren's request and was the reason B&A was paid almost $2 million between 2007 and 2010. Again, a contractor should not be characterized as a "whistleblower" if it reports on a condition the owner has hired it to correct.

B&A also argues that it need not stand "idly by until" Ameren's actions result in a violation. *Id.* at 40 (LF001548). Even where there is an employer/employee relationship, a plaintiff cannot predicate a cause of action for wrongful discharge on speculation either that a violation occurred in the past or that a violation ***might*** occur in the future. *See Margiotta*, 315 S.W.3d at 348 (plaintiff will not be given "protected status for making

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

complaints about acts or omissions he merely believes to be violations of the law or public policy"); *Murrell v. Allstate Ins. Co.*, 2014 WL 3858204, *11 (E.D.Mo. Aug. 6, 2014) (no "serious misconduct" where it was "pure conjecture" that customers were harmed by defendant's actions). B&A's speculation about future violations is based on Ameren's decision not to use B&A's services. Yet there are other plumbers Ameren has subsequently used to perform this work. Ex. Bishop 2 (LF000759). Bishop's self-serving opinion that none of them are as capable as B&A, Ex. D-35 (LF000462-63), does not elevate the failure to use B&A's services to serious misconduct or a violation of the law.

In sum, even had there been an employer/employee relationship, B&A failed to create a genuine issue of fact that Ameren engaged in any serious misconduct resulting in any violation of law. This is an alternate ground for summary judgment.

II. THERE IS NO CONTRACTUAL DUTY OF GOOD FAITH AND FAIR DEALING APPLICABLE TO TERMINATION OF A COMMERCIAL RELATIONSHIP THAT IS TERMINABLE AT-WILL (Responding to Point #2)

Even though there was no contract obligating Ameren to use B&A's services, B&A contends in Count II of the Amended Petition that by deciding to stop using B&A, Ameren breached a contract with B&A in violation of public policy and the implied duty of good faith and fair dealing. In granting summary judgment, the circuit court described

this claim as essentially a reiteration of B&A's wrongful discharge claim.[30] "Indeed, as Plaintiffs candidly acknowledge in their briefing, Count II is solely intended to plead 'an alternative theory of recovery to Count I.'" Appx-A40.

In its Substitute Brief, B&A never identifies the contract it is relying upon. *See Keveney*, 304 S.W.3d at 104 ("the existence and terms of a contract" is an essential element of breach of contract action). There was no agreement to use B&A's services for a definite or indefinite term. Rather, there was simply a purchase order that specified what B&A would be paid if Ameren decided to use its services on a particular job. Appx-A42; Facts, ¶¶8-10 (LF000689).

A contract is terminable at will unless it specifies a duration or limits the grounds for termination. *Armstrong Business Services, Inc. v. H&R Block*, 96 S.W.3d 867, 878 (Mo.App.W.D. 2002). As the circuit court recognized in granting summary judgment, even had there been a contractual commitment to use B&A's services, there was no agreement between B&A and Ameren that specified the duration of that commitment or the grounds for ending it. B&A's breach of contract claim in Count II would therefore fail because "this implied covenant [of good faith and fair dealing] does not apply to a commercial contract which is terminable at will." Appx-A41 (citing *Newco Atlas, Inc. v. Park Range Construction, Inc.*, 272 S.W.3d 886 (Mo.App.W.D. 2008)). In *Newco*, 272

[30] The same standard of review applies to the circuit court's grant of summary judgment on Count II as applies to its grant of summary judgment on Count I. *See* pp. 17-18, *supra*.

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S.W.3d at 894, the court of appeals concluded that implying a covenant of good faith and fair dealing into termination of an at-will commercial contract "would run counter to the very nature of such a contract" and "alter an intrinsic function of the contract."

All of the considerations that militate against a public policy wrongful discharge cause of action for independent contractors are applicable to a recognition of such a claim under the guise of an implied covenant of good faith and fair dealing. *See* Section I(B)(4), *supra*. As the circuit court concluded, it "would be irreconcilably inconsistent to hold the covenant is so broad that it can be used as an alternative basis for recovery where the only 'breach' alleged is that the relationship was terminated in violation of public policy and the real gravamen of Plaintiff's alleged grievance is a wrongful discharge claim, when this Court has affirmatively held that under Missouri law independent contractors have no cause of action for wrongful discharge in violation of public policy." Appx-A42-43.[31]

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[31] Courts in other jurisdictions also have rejected attempts by independent contractors to assert public policy wrongful discharge claims under the guise of an implied covenant of good faith and fair dealing. *See, e.g.*, *Burnette Techno-Metrics, Inc. v. TSI Inc.*, 44 F.3d 641, 643 (8th Cir. 1994) (applying Minnesota law); *Windisch v. Hometown Health Plan, Inc.*, 2015 WL 3649776, *1 (Nev. June 9, 2015); *Varisco v. Gateway Science and Engineering, Inc.*, 83 Cal.Rptr.3d 393, 395 (Cal.App.2 Dist. 2008); *Grossman v. Columbine Med. Group, Inc.*, 12 P.3d 269, 271 (Colo. App. 1999), *modified* (Jan. 17, 2000); *Ostrander v. Farm Bureau Mut. Ins. Co. of Idaho, Inc.*, 851 P.2d 946,

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

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This Court has defined the limits of the "narrowly drawn" public policy wrongful discharge cause of action. Those limits cannot be circumvented by captioning the action as a breach of the implied covenant of good faith and fair dealing. *E.g.*, *Neighbors v. Kirksville College of Osteopathic Medicine*, 694 S.W.2d 822, 824 (Mo.App.W.D. 1985). In granting summary judgment, the circuit court concluded:

> [G]iven the holdings in Neighbors, *supra*, Newco Atlas, *supra*, and many Missouri cases of similar ilk, the Court finds that Ameren's decision to stop using B&A's services on future plumbing jobs cannot support a claim for breach of the implied covenant of good faith and fair dealing.

Appx-A42.

In support of its contract claim, B&A again relies on *Bishop v. Shelter Mut. Ins. Co.*, 129 S.W.3d 500 (Mo.App.S.D. 2004). As noted previously, *see* page 22, *supra*, the court of appeals in that case did not focus on the independent contractor issue because Shelter did not dispute the plaintiff should be treated as its employee. Moreover, the *Shelter Mutual* court stated:

> It is clear that "Missouri law concerning at-will employees may not be circumvented by an employee who alleges a contract of good faith and fair dealing between the employer and employee."

949-50 (Idaho 1993); *New Horizons Electronics Mktg., Inc. v. Clarion Corp. of Am.*, 561 N.E.2d 283, 287 (Ill.App.2 Dist. 1990).

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Id. at 506 (quoting *Neighbors*, 694 S.W.2d at 824). Since the plaintiff in *Shelter Mutual* did not assert his termination as an employee violated any statute or public policy, the court found he did not state a claim for wrongful discharge and could not circumvent the public policy requirement for a wrongful discharge action by alleging a breach of the implied covenant of good faith and fair dealing. *See Newco Atlas, Inc.*, 272 S.W.3d at 894 (rejecting covenant of good faith and fair dealing in at-will employment context); *Kelly v. State Farm Mut. Auto. Ins. Co.*, 218 S.W.3d 517, 524 (Mo.App.W.D. 2007) ("there can be no claim for the breach of an implied covenant of good faith and fair dealing in the termination of an at-will employment relationship," citing *Shelter Mutual*).

The other cases relied on by B&A in its brief are also inapposite. Neither *Kmak v. American Century Companies, Inc.*, 754 F.3d 513 (8th Cir. 2014), nor *Smith v. City of Byrnes Mill, Mo*., 2015 WL 4715948 (E.D.Mo. Aug. 7, 2015), addressed the termination of an at-will business relationship with an independent contractor, let alone a relationship that included no commitment to use the contractor's services. *Kmak* involved an employer's exercise of a contractual right to buy back stock purchased by a former employee through a stock option plan. The Eighth Circuit held that "[t]o establish a breach of the covenant of good faith and fair dealing, 'the plaintiff has the burden to establish that the defendant exercised a judgment conferred by the express terms of the agreement in such a manner as to evade the spirit of the transaction or so as to deny [the plaintiff] the expected benefit of the contract.'" *Kmak*, 754 F.3d at 516 (quoting *Lucero v. Curators of Univ. of Mo*., 400 S.W.3d 1, 9-10 (Mo.App.W.D. 2013)). While the express terms of the contract gave the employer the discretion to choose the time to

repurchase the stock, the expected benefit of the stock option plan was to provide compensation for the employee's services. *Id.* at 518. Therefore, the Eighth Circuit found that the employer's decision to repurchase the stock at a time disadvantageous to the former employee in retaliation for his testimony in an arbitration would violate a clear public policy in Missouri that prohibits retaliation for providing testimony in a quasi-judicial proceeding. *Id.* at 517-18.

The circuit court analyzed *Kmak* and found it "a far cry from the situation in the case at bar, where an independent contractor – not a former employee – seeks relief for alleged wrongful discharge, under an agreement that clearly by its terms was terminable at will by either party." Appx-A43; *see Kelly*, 218 S.W.3d at 524 (granting JNOV on implied covenant of good faith and fair dealing claim where contracts "provided that Plaintiffs were independent contractors" and "the relationship could be terminated upon written notice").

Smith involved a claim of an alleged breach of the implied covenant of good faith and fair dealing arising out of the termination of an employee by a municipality. 2015 WL 4715948, *2. Sovereign immunity barred the public policy wrongful discharge claim that otherwise would have been available to the employee. *Id.* at *3. Because Missouri law "does *not* allow **employers** to terminate at-will **employees** for reasons that violate public policy," the magistrate concluded that permitting a municipal employee to bring a breach of contract claim based on a violation of public policy and the implied covenant of good faith and fair dealing "**would not 'subvert'** Missouri's at-will doctrine." *Id.* at *5 (bold emphasis added).

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

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Smith is inconsistent with a long line of Missouri cases rejecting claims of at-will employees for breach of the implied covenant of good faith and fair dealing and is obviously not binding on this Court. *See Shelter Mutual*, 129 S.W.3d at 506 ("[T]he Missouri employment at-will doctrine expressly prohibits any consideration of the *implied* covenant of good faith and fair dealing (inherent in all contracts) *when an employer is sued for terminating the employee*.") (emphasis in original); *Neighbors*, 694 S.W.2d at 824; *see also May v. Pratt Industries (U.S.A.), Inc.*, 2008 WL 1777409, *4 (E.D.Mo. Apr. 16, 2008); *Fink v. Revco Disc. Drug Centers, Inc.*, 666 F.Supp. 1325, 1329 (W.D.Mo. 1987); *Kempe v. Prince Gardner, Inc.*, 569 F.Supp. 779, 781 (E.D.Mo. 1983). More importantly, *Smith*'s logic is predicated on this Court having recognized a wrongful discharge cause of action in the employer/employee context. This Court has not recognized such a claim for independent contractors. Therefore, under the logic of *Smith*, recognition of a public policy good faith and fair dealing contract action by independent contractors ***would subvert*** the limits on the public policy wrongful discharge doctrine in Missouri, which requires an employer/employee relationship.

In sum, the circuit court properly granted summary judgment on Count II of the Amended Petition.

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

III. PUNITIVE DAMAGES ARE NOT AVAILABLE EVEN IF B&A'S WRONGFUL DISCHARGE CLAIM IS ALLOWED TO PROCEED BECAUSE IMPOSITION OF PUNITIVE DAMAGES FOR A NOVEL CAUSE OF ACTION VIOLATES DUE PROCESS (Responding to Point #3)

Because B&A's wrongful discharge in violation of public policy claim fails as a matter of law, B&A's argument that punitive damages should be available for such a cause of action is moot. However, even if the Court were to reverse the circuit court's grant of summary judgment on this claim, constitutional and common law considerations of due process and fundamental fairness still prohibit any award of punitive damages on a claim never before recognized in this State. The dismissal of B&A's prayer for punitive damages is an issue of law which this Court reviews *de novo*. *E.C.E., Inc. v. Jeffrey*, 104 S.W.3d 420, 423 (Mo.App.E.D. 2003).

A. Punitive Damages Are Not Available on a Novel and Unprecedented Cause of Action

The circuit court properly dismissed B&A's prayer for punitive damages on its wrongful discharge claim. Punitive damages "are subject to constitutional constraints" and it is "fundamentally unfair, as a matter of due process, to subject a party to liability for punitive damages on a tort claim that has never before been recognized in the law." Appx-A10-11.[32] They are imposed only if the plaintiff presents clear and convincing

[32] The circuit court also rejected B&A's claim of punitive damages under Count II for breach of contract. B&A has not appealed that ruling.

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evidence that the defendant "not only intended to do the act which is ascertained to be wrongful but that he knew it was wrongful when he did it." *Deck and Decker Personnel Consultants, Ltd. v. Thomas*, 623 S.W.2d 90, 92 (Mo.App.W.D. 1981) (internal quotation omitted).

As a matter of constitutional due process, fair notice of both the proscribed conduct and the potential penalty is required before punitive damages may be imposed. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996); *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697, 702 (Mo. banc 2008). Ameren could not have had fair notice that its decision to stop using B&A's services was not only proscribed conduct, but conduct that could subject it to the harsh penalty of punitive damages, when neither Missouri nor any other jurisdiction has recognized a common law cause of action for wrongful discharge of an independent contractor like B&A based on an alleged public policy violation.

Courts in other jurisdictions have specifically held in wrongful discharge actions involving employees that "punitive damages should not be awarded where, as here, the cause of action forming the basis for their award is a novel one." *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353, 360 (Ill. 1978).[33] Ameren could not have acted with an "evil

[33] *See also Dorshkind v. Oak Park Place of Dubuque II, L.L.C.*, 835 N.W.2d 293, 308-09 (Iowa 2013) (punitive damages not available since administrative rules not recognized as source of public policy at time of discharge); *Hansen v. Harrah's*, 675 P.2d 394, 397 (Nev. 1984) (punitive damages not available on novel theory of retaliatory

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

motive or reckless indifference" to the rights of B&A, *see Peters v. General Motors Corp.*, 200 S.W.3d 1, 24-25 (Mo.App.W.D. 2006), when, at the time it stopped using B&A's services, no Missouri court had held an independent contractor could claim wrongful discharge in violation of public policy.

B&A suggests that *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859 (Mo.App.W.D. 1985), and this Court's opinion in *Keveney* somehow support the recoverability of punitive damages here. B&A Substitute Brief 63-67. As B&A concedes, however, the issue whether such damages are available retrospectively was not before either court. B&A Substitute Brief 63. *Boyle* did not address the issue in any way. In *Keveney*, 304 S.W.3d at 105 n.3, this Court simply stated it did not need to determine if punitive damages were available in a breach of contract action because there was a wrongful discharge tort claim.

Even if this Court had concluded that Keveney had a punitive damages claim, it would have little relevance in this case. *Keveney* held that an existing cause of action for wrongful discharge on behalf of employees included both at-will and contract employees. Here, B&A seeks to expand that cause of action beyond the employer/employee relationship that this Court has held is a necessary requirement. Under such

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discharge for filing workmen's compensation claim); *Nees v. Hocks*, 536 P.2d 512, 517 (Or. 1975) (punitive damages not available on novel theory of retaliatory discharge for serving jury duty).

circumstances, considerations of due process and fair notice clearly prohibit the award of punitive damages.

B. The *Sumners* Retroactivity Analysis is Inapplicable

B&A argues that the order dismissing its punitive damages claim should be reversed based on the retroactivity analysis in *Sumners v. Sumners*, 701 S.W.2d 720 (Mo. banc 1985). B&A Substitute Brief 63-65. The short answer is that the *Sumners* analysis is not applicable to this case. *Sumners* did not involve the due process implications of a retrospective penalty. Rather it concerned the question whether a decision overruling prior precedent should be applied in other pending cases where the underlying facts occurred prior to the change in the decisional law. It did not address the constitutional issues raised by the imposition of punitive damages, which were the basis for the circuit court's judgment below.

However, even the non-constitutional fairness considerations discussed in *Sumners*, 701 S.W.2d at 724, counsel against allowing a punitive damages claim here. There is no precedent for wrongful discharge claims by independent contractors, and a key purpose of punitive damages—to deter wrongdoers—would not be served by punishing conduct that was lawful when it occurred.

The circuit court properly concluded that the Amended Petition failed to state a cognizable claim for punitive damages because "the principle of fair notice prevents a court from subjecting a defendant to punitive damages for a tort that has not been clearly established prior to the time of the conduct at issue." Appx-A11.

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

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IV. THE CIRCUIT COURT PROPERLY RULED THAT THE INDIVIDUAL RESPONDENTS ARE ENTITLED TO SUMMARY JUDGMENT ON B&A's TORTIOUS INTERFERENCE CLAIM (Responding to Point #4)

The retaliatory nature of this lawsuit is dramatically illustrated by the tortious interference and defamation claims B&A filed against individual Ameren employees who simply did their jobs. In Counts III and IV of its Amended Petition, B&A sought to hold respondents Armistead, George, and Wright liable under theories of tortious interference with a business relationship and defamation. B&A has appropriately abandoned its claim of defamation on appeal because, as the circuit court held, there was no publication to a third party of any communications about B&A. Any statements were "*solely* amongst Ameren management personnel [concerning] the cost of an independent contractor whose plumbing they were responsible for overseeing." Appx-A18 (emphasis in original).

In granting summary judgment, the circuit court found B&A's tortious interference claim "fatally flawed for at least two reasons." Appx-A19. First, "since the Defendants were acting as agents for Ameren, there can be no claim against them for 'interfering' with their – i.e., Ameren's – very own business relationship." *Id.* Second, the circuit court found there was no competent evidence to bring B&A's claim within what it believed to be "the lone recognized exception" to this rule. "Our courts have held that an agent of a corporation may be deemed a third party for purposes of a tortious interference claim **only** if the agent employs 'improper means' **and** also acts only for his own financial gain and self-interest, rather than for the benefit of the corporation." Appx-

A20 (emphasis in original) (citing *Jones v. Paradies*, 380 S.W.3d 13, 17 (Mo.App.E.D. 2012)).[34]

The undisputed facts show that the individual respondents were clearly agents of Ameren in their dealings with B&A. Under this Court's opinion in *Farrow*, that alone is sufficient to affirm the circuit court's grant of summary judgment on the tortious interference claim. However, even if it is necessary to consider the "recognized exception," the circuit court properly concluded that B&A did not present competent evidence that any of the individual respondents employed "improper means" and acted for their own financial gain and self-interest.

A. Ameren's Supervisory Personnel Are Not Third Parties Subject to Liability for Interference with Ameren's Business Relationships

It is axiomatic that "'an action for tortious interference with a business expectancy will lie against a third party only.'" *Farrow*, 407 S.W.3d at 602 (quoting *Zipper v. Health Midwest*, 978 S.W.2d 398, 419 (Mo.App.W.D. 1998)). "'Where the individual being sued is an officer or agent of the defendant corporation, the officer or agent acting for the corporation *is* the corporation for purposes of tortious interference.'" *Id.* (emphasis added); *see also Nickel v. Stephens College*, 480 S.W.3d 390, 399-400 (Mo.App.W.D. 2015) (affirming summary judgment on tortious interference claim by

[34] The same standard of review applies to the circuit court's grant of summary judgment on Count III as applies to its grant of summary judgment on Count I. *See* pp. 17-18, *supra*.

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

student against college employees because employees were agents of college and therefore not third parties to alleged contract between student and college).

In *Farrow*, this Court affirmed summary judgment for a doctor on a nurse's claim he tortiously interfered with her business expectancy with the hospital that employed her. This Court affirmed for two independent reasons. First, it found the Farrow failed to allege facts showing the doctor's lack of justification for his negative statements about her work, because, as her supervisor, the doctor "had a legal right to criticize her work performance." *Farrow*, 407 S.W.3d at 602. Second, the Court held "this action cannot be maintained against Doctor because while acting as Farrow's supervisor, he was Hospital's agent, not a third party." *Id.* at 602-03.

Courts interpreting *Farrow* have held that an officer or agent cannot tortiously interfere with his employer's business relationship with a plaintiff even if the officer or agent used improper means and acted out of self-interest. *See, e.g.*, *Graham v. Hubbs Machine and Manufacturing, Inc.*, 92 F.Supp.3d 935, 943-44 (E.D.Mo. 2015) (under *Farrow*, terminated employee does not have tortious interference claim against agent of employer even if agent motivated by personal interests); *Schwartze Bramblett v. City of Columbia, Mo.*, 2014 WL 2572829, *3-4 (W.D.Mo. June 9, 2014) (under *Farrow*, allegations of improper means and lack of corporate purpose did not preclude judgment on pleadings for City Manager since in that capacity he was agent of City).

B&A has alleged, and the respondents have admitted, that at all relevant times the individual respondents were management employees of Ameren acting within the scope of their employment. *See* Amended Petition ¶¶7, 53 (LF000129, LF000141) and

Amended Answer thereto, ¶¶7, 53 (LF000215, LF000232-33); *see also* Facts ¶¶5-7 (LF000688). As a consequence, B&A cannot maintain an action against them for tortious interference with its business relationship with Ameren.

B. There is No Competent Evidence that the Individual Respondents Used Improper Means and Acted out of Self-Interest

Even if the "recognized exception" discussed by the circuit court can be applied to agents of a party to the business relationship, the circuit court properly found that B&A did not present competent evidence of either the improper means or self-interest necessary to create a genuine issue of fact.

1. B&A Has No Competent Evidence of Improper Means

"Improper means are those that are independently wrongful," as "recognized by statute or the common law." *Stehno v. Sprint Spectrum, L.P.*, 186 S.W.3d 247, 252 (Mo. banc 2006). B&A argues that the individual respondents "engaged in improper means by misrepresenting facts and violating public policy by retaliating against [B&A]." B&A Substitute Brief 72. The circuit court focused on the defamation claim in its discussion of tortious interference because that was the gravamen of B&A's opposition to summary judgment. Appx-A20-21. Since B&A has abandoned its defamation claim, this Court should affirm summary judgment on the tortious interference claim for that reason alone. *See Central Trust and Investment Company v. Signalpoint Asset Management, LLC*, 422 S.W.3d 312, 324 (Mo. banc 2014) (affirming summary judgment on tortious interference claim where no evidence to support the only alleged "improper means"); *Castle Rock Remodeling, LLC v. Better Bus. Bureau of Greater St. Louis, Inc.*, 354 S.W.3d 234, 245

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(Mo.App.E.D. 2011) (if defamation claim fails, tortious interference claim based on defamation must also fail).

However, even if this Court considers the additional "improper means" urged on appeal, the individual respondents are still entitled to summary judgment. As set out in Section I of this brief, there is no statute or common law rule that makes the public policy wrongful discharge doctrine applicable to independent contractors. And even in the employer/employee context, the doctrine does not apply to individual supervisors. *Farrow*, 407 S.W.3d at 595. So even if there were competent evidence that one of the individual respondents retaliated against B&A for reporting environmental and plumbing violations—and there is not—such conduct by an individual would not be "independently wrongful" under any statute or the common law. Therefore, it could not constitute "improper means." Resp. Appx-A10.

As for the allegation of misrepresentations as "improper means," B&A appears to argue that even if statements by individual respondents were not defamatory as it originally alleged, they still constitute misrepresentations of fact. On pages 72-73 of its Substitute Brief, B&A lists—without the benefit of any citation to the record—a number of alleged statements purportedly made by Armistead, Wright and George. These include statements that B&A was "dishonest" or "falsely billed." In fact, there are no statements in the record, even in the form of hearsay, that anyone said B&A was "dishonest" or "falsely billed." Rather, Bishop testified that others told him they overheard statements that B&A was "expensive," that some of B&A's work was "unnecessary" and "excessive," and that B&A "turned everything into a project." B&A Substitute Brief 22,

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Facts, ¶¶78-90 (LF000717-19); Appx-A18 (identifying alleged statements for purposes of summary judgment).

There are at least three reasons this testimony cannot create a genuine issue of fact on "improper means." First, B&A cites to Bishop's testimony relating what someone else told him about what an individual respondent said about B&A. B&A Substitute Brief 22. This is classic hearsay and cannot be considered in determining whether B&A has created a genuine issue of disputed fact. *See Bryant v. Bryan Cave, LLP*, 400 S.W.3d 325, 333 (Mo.App.E.D. 2013) (hearsay must be rejected when determining whether plaintiff has satisfied its burden on summary judgment).

Second, even if this evidence were admissible, statements that a contractor is "expensive," "turns everything into a project" or uses more equipment than necessary are clearly statements of opinion. Therefore, as a matter of law, they are not misrepresentations. *Kruse Concepts, Inc. v. Shelter Mut. Ins.*, 16 S.W.3d 734, 738 (Mo.App.E.D. 2000) (statements of opinion are not misrepresentations for purposes of determining whether defendant used "improper means"). This Court has held that expressing negative opinions about the work performance of a person or entity under one's supervision is not independently wrongful and does not constitute improper means. *Farrow*, 407 S.W.3d at 602 ("Doctor was Farrow's supervisor, and he had a legal right to criticize her work performance"); *Stehno*, 186 S.W.3d at 252-53 (voicing concerns that consultant was "high maintenance" and "magnet for conflict" not improper means). The Eastern District Court of Appeals recently noted that a manager ***should*** concern himself with whether a worker is being overcompensated, and expressing that concern does not

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constitute improper means but is in the best interests of the corporation. *Hibbs v. Berger*, 430 S.W.3d 296, 319 (Mo.App.E.D. 2014).

Third, even if the alleged statements were construed to be fact rather than opinion, B&A failed to present any competent evidence that the alleged statements were false, let alone knowingly so. Under Missouri law, "[m]isrepresentation is generally defined as a falsehood or untruth made with the intent of deceit rather than inadvertent mistake." *Kerwin v. Missouri Dental Bd.*, 375 S.W.3d 219, 229 (Mo.App.W.D. 2012) (citation omitted). B&A did not present any evidence that purportedly showed B&A was not "expensive," was not using "excessive" equipment, or did not expand a job beyond its original scope.[35] Nor is there any competent evidence the individual respondents knew

[35] B&A effectively concedes that it was expensive. It notes that Ameren's expenditures on plumbing services increased "nearly three-fold for plumbing and preventative maintenance services between 2006 and 2009," B&A Substitute Brief 8, when B&A was performing the majority of the plumbing jobs. Between 2007 and 2009 alone, Ameren spent approximately $1.7 million on the services of B&A. *Id.* at 5. Ameren's plumbing expenses decreased dramatically in 2010 when they began directing work to plumbers other than B&A. Ex. Bishop 2 (LF000759). Bishop acknowledged in his deposition testimony that B&A used "expensive equipment" and could not compete on price with other plumbing contractors because other contractors were not as

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

that such statements were in any sense false. It is not competent evidence of respondents' knowledge of falsity for Bishop to assume that Wright and George would have known their statements were false from their "knowledge in building services" or because "the results, the photo reports everything proved what the situation was and what the results were." Bishop Dep. (11/14) 242-51 (LF001228-30).

Finally, B&A asserts that individual respondents Armistead and Wright employed "improper means" by "concoct[ing] a false reason for B&A's termination," *i.e.*, that B&A was given a directive in the past to notify Ameren before doing routine maintenance work. B&A Substitute Brief 72-73. B&A again ignores the requirement that an action be "independently wrongful" in order to constitute improper means. Neither Ameren nor its supervisors had any statutory or common law obligation to provide B&A with ***any*** reason for the decision not to use B&A's services. Therefore, providing B&A with a reason, even if false, cannot be independently wrongful. Moreover, it is undisputed that Mike Wright sent B&A an email in February 2009 about obtaining approval before performing routine maintenance, sent B&A a similar instruction in July 2010, and that after receiving the latter instruction, B&A took issue with Ameren's ability to control B&A's access to Ameren's property. *See* pp. 13-15, *supra*. So, as Armistead wrote Menne, Bishop's sweeping assertion—that "in 5 yrs

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"thorough," *i.e.*, less expensive. Bishop (5/14) Dep. 96-98, 356-57 (LF001061-62, LF001128).

[B&A hadn't] been addressed with" getting approval for flex services—was indeed "not true." *See* Ex. Bishop 11 (LF000788-91).

2. There is No Competent Evidence the Individual Respondents Acted Solely in Their Own Self-Interest

Since B&A has failed to present competent evidence that any of the individual respondents committed an independently wrongful act, this Court need not reach the second requirement for any exception to the third party rule in tortious interference cases: that the defendant acted ***solely*** for his own personal financial gain and self-interest. Nevertheless, there is absolutely no evidence that any of the individual respondents financially benefited from the decision to no longer use B&A's services or that the decision was motivated in any way, let alone solely, by their own self-interest as opposed to what they perceived to be Ameren's corporate interests.

B&A lists several bullet points on pages 73-74 of its Substitute Brief as "[r]ecord evidence of the individual Defendants' self-interest and personal animus toward Plaintiff." B&A does not provide any citations to the legal file as evidentiary support for these statements because there are none. These statements are counsel's characterizations of Bishop's impressions and personal beliefs about the attitudes of the individual respondents. Such conclusory statements do not constitute competent evidence to oppose a summary judgment motion. *Garrett v. Impac Hotels 1, LLC*, 87 S.W.3d 870, 872 (Mo.App.E.D. 2002) ("[p]arties may not avoid summary judgment by introducing their own statements of conclusory allegations in order to create a genuine issue of material fact"); *Graham v. Hubbs Mach. & Mfg., Inc.*, 2015 WL 851225, *2 (E.D.Mo. Feb. 26,

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2015) ("conclusory allegations that [supervisors] 'acted without legitimate business justification' and 'acted out of greed and self-interest'" are insufficient to survive a motion to dismiss).

For example, B&A asserts that the individual respondents "were intentionally targeting Bishop because they did not want to hear his reports that illegal conditions needed to be remedied." B&A Substitute Brief 73. There is no evidence in the record that any of the individual respondents made statements to this effect. Nor does the summary judgment record include any other evidence of such an intent. Bishop testified only that he was "under the impression" this was the case. Bishop Dep. (5/14) 419 (LF001145). B&A claims that "Wright did not share previous Ameren managers' appreciation of B&A's diligence and protective approach to Ameren, but was more concerned about meeting his budgets and his personal career advancement." B&A Substitute Brief 74. This is clearly a conclusion and its "support" is simply Bishop's opinion that Wright did not have "the best intentions." Bishop Dep. (5/14) 135 (LF001071).

B&A also refers to Armistead being "offended" and becoming "pissed" when B&A reported an "illegal and improper" job authorized by Armistead. B&A Substitute Brief 74; Bishop Dep. (5/14) 343-50 (LF001125-27). This purportedly involved the build-out of a kitchen/break room in the Ameren headquarters building twenty years before the events at issue in this lawsuit. *Id.*; Bishop Dep. (5/14) 210-13 (LF001091); Deposition of Scott Held 100-03 (LF001259-60). These characterizations of Armistead's attitude are nothing more than inadmissible conclusion or supposition.

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

Electronically Filed - SUPREME COURT OF MISSOURI - September 01, 2016 - 04:56 PM

The same is true for the assertion that Wright was "antagonist[ic]" and "had a chip on his shoulder" regarding B&A. B&A Substitute Brief 74. The word "antagonistic" does not appear in any of the testimony and the only support for Wright having a "chip on his shoulder" is Bishop's testimony that someone else at Ameren told him he had that impression about Wright because Wright felt that B&A charged too much for a prior plumbing project. Bishop Dep. (5/14) 183-86 (LF001084-85). This testimony is again incompetent and inadmissible. *Bryant*, 400 S.W.3d at 333 (emphasizing that "[a] witness's attempt to state what was in someone else's mind is either sheer speculation or unadulterated hearsay") (citation omitted).

Bishop's impressions of personal animus are also beside the point. As the Eastern District Court of Appeals observed in the employment at will context:

> Defendants may not have liked plaintiff but that does not convert her discharge as an employee at will into an interference for personal, not corporate, reasons. To support a cause of action for intentional interference with a contract or business expectancy by a supervising employee over an at will employee requires evidence eliminating any business justification at all for the termination – a level of proof close to impossible to achieve.

Eggleston v. Phillips, 838 S.W.2d 80, 83 (Mo.App.E.D. 1992); *see also Farrow*, 408 S.W.3d at 603 (no tortious interference even though doctor "berated, intimidated, harassed and yelled at" nurse and said he was "going to get her out"). B&A mischaracterizes this Court's opinion in *Stehno* in an attempt to support its argument. *Stehno* merely noted that the individual defendant did not display personal animus for the

plaintiff but, like here, "voiced her concerns about him to protect the corporate interests of her employer." 186 S.W.3d at 252-53. *Stehno* did not hold that personal animus established self-interest for purposes of invoking the improper means exception.

The circuit court properly concluded that "there simply is no competent evidence in the record indicating the individual Defendants' actions . . . were done 'to further only [their] own interests,' as opposed to being done wholly—or at the very least in significant part—to pursue the interests and agenda and goals of the corporate employer for whom they worked, Ameren." Appx-A20. There is not a scintilla of evidence that any of the individual respondents gained anything personally from the decision to end the business relationship with B&A. They were all charged with monitoring the work and expense of independent contractors like B&A for the benefit of Ameren and all of their alleged comments, even if supported by competent evidence, were made in that context.

Again, under *Farrow*, the improper means exception does not apply here because the individual respondents are not third parties for the purpose of tortious interference. But even if it did, B&A has not adduced any competent evidence that the individual respondents employed improper means, much less did so ***only*** for their self-interest. Therefore, the grant of summary judgment on Count III, B&A's tortious interference claim, must be affirmed.

CONCLUSION

This Court's unequivocal holding that a wrongful discharge claim requires an employer/employee relationship is soundly rooted in public policy, the law of contracts and common sense. Ameren had no contractual obligation to use B&A's services. Yet

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under the guise of a wrongful discharge claim, B&A essentially claims that Ameren was obligated to give B&A an exclusive contract, exempt it from competitive bidding, and let it decide where and when it would do routine maintenance. B&A alleges that supervisors who merely questioned the costs and necessity of B&A's work are liable for tortious inference with this "contract." The law and public policy value freedom of contract and do not permit a contractor to extort business by claiming that the very conditions it was paid to correct are somehow "serious misconduct." All of the regulatory agencies B&A contacted saw its complaints for what they were: unfounded attempts by a disgruntled contractor to punish a company for having the temerity to put its plumbing work out for bid and to control access to its property. As every jurisdiction has found, there is no justification for creating a common law wrongful discharge cause of action for independent contractors. There are compelling public policy reasons for not doing so. Respondents respectfully request that this Court affirm the judgment of the circuit court below.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Substitute Brief of Respondents was filed electronically with the Clerk of the Court and served by operation of the Court's electronic filing system on this 1st day of September, 2016 upon:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. Substitute Brief of the Respondents contains the information required by Rule 55.03;

2. Substitute Brief of Respondents complies with the limitations contained in Rule 84.06(b);

3. Substitute Brief of Respondents, excluding the cover page, certificate of service and this certificate, contains 23,495 words, as determined by the word count tool contained in Microsoft Word 2013.

Dated: September 1, 2016 /s/ Robert T. Haar